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Supreme Court, U.S.
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# In the
# Supreme Court of the United States

JOHN HALTOM and
DOCTOR JOHN'S, INC., dba DOCTOR JOHN'S
LINGERIE AND NOVELTY BOUTIQUE,
*Petitioners*,

v.

MIDVALE CITY CORPORATION,
*Respondents*.

**On Petition for Write of Certiorari**
**To The Utah Supreme Court**

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## PETITION FOR WRIT OF CERTIORARI

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# QUESTIONS PRESENTED

This Court has previously determined on multiple occasions that licensing ordinances which impose a prior restraint upon the dissemination of non-obscene, presumptively protected speech and expression must provide a mechanism of prompt judicial review to pass constitutional muster. *See, e.g., FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). The first question presented is whether the Utah Supreme Court's ruling that the issuance of a temporary license coupled with the ability to access the courts satisfies this requirement, which is in conflict with a number of federal circuits, comports with the First Amendment.

This Court also has a long-standing tradition of relaxing traditional standing requirements when the First Amendment is potentially at risk. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Thornhill v. Alabama*, 405 U.S. 438 (1940). The second question presented is whether a business engaged in the sale of presumptively protected, expressive material need apply for a license or otherwise demonstrate actual harm to mount vagueness, overbreadth, and other facial challenges to the licensing scheme.

## PARTIES TO THE PROCEEDING

Petitioners are John Haltom, an individual, and Dr. John's, Inc. dba Dr. John's Lingerie and Novelty Boutique. Respondent is Midvale City Corporation, a municipality located within the State of Utah.

Dr. John's, Inc. dba Dr. John's Lingerie is not owned by any parent corporations, is not a publicly traded corporation, and is not owned in whole or in part by any publicly traded corporation.

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The First Amendment to the
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John Haltom and Dr. John's, Inc. dba Dr. John's Lingerie and Novelty Boutique respectfully petition for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

## OPINIONS BELOW

The opinion of the Utah Supreme Court rejecting Petitioners' appeal (App., *infra*, 1a -51a) is reported at 73 P.2d 334. The order of the Utah Supreme Court denying Petitioners' motion for rehearing (App., *infra*, 73a - 75a) is unreported. The memorandum decision and findings of fact and conclusions of law of the Utah District Court for the Third Judicial District (App., *infra*, 52a - 72a) are also unreported.

## JURISDICTION

The judgment of the Utah Supreme Court was entered on May 16, 2003. A petition for rehearing was denied on July 2, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." The Midvale City licensing ordinance at issue is reprinted in full in an appendix to this petition. App., *infra*, 76a-104a.

## STATEMENT

Petitioners John Haltom and Dr. John's, Inc. ("Haltom") own and operate a retail store located in Midvale City, Utah known as Dr. John's Lingerie and Novelty Boutique. App., *infra*, 2a. In order to do business within the City, Haltom applied for a general business license in June of 2000. *Id.* at 2a-3a. Pursuant to that application, City officials inspected the store before its inventory had been fully stocked and before its doors were open to the public. *Id.* at 54a. During that inspection, the officials observed one deck of playing cards depicting nude women, an instructional book and video set about lovemaking, several different massage oils, and boxes of lingerie. App., *infra*, 54a. As a result, the City informed Haltom that his general business license application was rejected and that he would have to seek a special sexually oriented business license required of only those businesses whose "principal business purpose" is to sell adult-oriented material. *Id.* at 54a-55a.[1]

Desiring not to constitute an adult business under the City's adult business licensing scheme, Haltom elected instead to alter the percentage of his inventory so that adult products did not comprise a principal purpose of his business. App., *infra*, 56a-57a. To this end, Haltom continued to carry adult novelty items but restricted that inventory to a small percentage of floor space. He then stocked the remainder of the store with lingerie and traditionally expressive items, including some sexually explicit videos and magazines. App.,

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[1] The entire Midvale City sexually oriented business licensing scheme, which is codified as Chapter 5.56 of the Midvale City Code and referred to in this petition as "the ordinance" or "Ord.," is included in the appendix to this petition. App., *infra*, 76a-104a.

*infra*, 56a-58a. The City, however, believed that even with such alterations, Haltom was indeed operating an adult enterprise without a valid license to do so. It issued a series of citations against Haltom and the store and ultimately filed a complaint in state court alleging that the store constituted an adult bookstore and seeking injunctive relief against its operation. *Id.* at 62a-63a.

Haltom defended the injunction action on constitutional grounds. First, he alleged that the ordinance was facially invalid because it imposed a prior restraint on the dissemination of protected expression absent a mechanism for prompt judicial review:

> The first is that under FWPPS [sic], the ordinance must -- I'll cite you to the page -- it's page 8 on the document that I've handed you, and what it says is, "The first two safeguards are essential. The licensor must make the decision whether to issue the license within a specified reasonable time during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied."
>
> The ordinance as of 8/16/00 provides for appeals under 5.56.360 but it's an administrative appeal only, it is not a judicial appeal, and I think that under FWPPS [sic] the ordinance fails for no other reason than that.

Trial Transcript, p. 382. Second, he alleged that the ordinance was unconstitutionally vague and overbroad because the definition of adult bookstore contained in the ordinance failed to give adequate notice to business owners who might be required to seek a special license:

> Your Honor, the problem is that the ordinance does not allow a person of sufficient intelligence -- on its face, a person of average intelligence sufficient guidance to constitutionally apply it. This is a facial challenge, your Honor.
>
> ***
>
> The next challenge that we've raise is that the ordinance is overbroad, and that's an as-applied challenge, in that it prohibits what is clearly protected First Amendment activity.

*Id.* at 379-381. The trial court resolved these issues by holding, first, that the ordinance was not required to satisfy the prompt judicial review requirement because it was designed to prevent secondary effects and not the dissemination of ideas or expression, and, second, that Haltom had standing to mount a vagueness and overbreadth challenge to the ordinance but that the challenge was not persuasive on its merits. Memorandum Decision, App., *infra*, 68a, 69a. The trial court then ruled that Haltom's store constituted an adult bookstore as defined by the ordinance and imposed a permanent injunction prohibiting Haltom from continuing to operate without an adult business license. *Id.* at 69a-71a.

Haltom appealed to the Utah Supreme Court and raised similar constitutional challenges. His appellate brief contained, *inter alia*, the following assignments of error:

> POINT I: THE ORDINANCE GOVERNING THE SALE OF "SEXUALLY ORIENTED" MATERIALS IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED TO DEFENDANTS; AND IT IS AN UNLAWFUL PRIOR RESTRAINT
>
> POINT II: THE ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD IN THAT IT PROHIBITS CONDUCT WHICH IS CONSTITUTIONALLY PROTECTED
>
> POINT VI: THE ORDINANCE FAILS TO PROVIDE FOR PROMPT JUDICIAL REVIEW OF A LICENSE DENIAL

Brief of Appellants John Haltom et al., Table of Contents. The Utah Supreme Court rejected each of these arguments, upheld the ordinance as a constitutional time, place, and manner restriction on speech, and sustained the imposition of injunctive relief against the business. App., *infra*, 1a-51a.

* * * * * * * * * * * * * * *

1. Midvale City's sexually oriented business licensing scheme implicates the First Amendment by requiring individuals and businesses who make expressive, erotic materials available to the consenting adult public to first seek the approval of the government.[2] Ord. §§ 5.56.010; 5.56.040. The ordinance makes it a crime to operate an adult business without such approval in the form of a sexually

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[2] Once licensed, the ordinance subjects the licensee to various business regulations, including locational and interior configuration requirements. Ord. §§ 5.56.030; 5.56.190; 5.56.210.

oriented business license. Ord. § 5.56.370. In this regard, the ordinance functions as a classic prior restraint because it prohibits and even criminalizes the dissemination of protected expression unless and until the government agrees to allow it. *See FW/PBS*, 493 U.S. 215.

This Court has previously required licensing ordinances of this type to provide for, *inter alia*, prompt judicial review of any adverse licensing decision in order to temporally minimize the imposition of an improper prior restraint. *Id.*; *see also Freedman v. Maryland*, 380 U.S. 51(1965). This requirement has produced much debate amongst the state and federal courts attempting to apply its mandate. In one camp are the prompt access courts, who conclude that merely providing timely access to a judicial forum is sufficient to satisfy the requirement. *See, e.g., Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999); *TK's Video v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994). On the other hand are several other circuits and state courts holding that a more rigorous prompt judicial determination is required. *See, e.g., Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998). This Court has yet to resolve this conflict.

Midvale City's sexually oriented licensing ordinance contains no provision for judicial review. It is true that the ordinance establishes a system of local administrative appeals when a license is denied, suspended or not reviewed, but the section of the ordinance containing those provisions is silent as to the role of any judicial officer. Ord. § 5.56.360. The trial court resolved this apparent problem by characterizing the ordinance not as a prior restraint but instead as a time, place, and manner restriction not subject to the prompt judicial review requirement. App., *infra*, 68a. The Utah Supreme Court later altered this conclusion on appeal by analyzing the ordinance as a classic prior restraint governed by the *FW/PBS* judicial review provision. App., *infra*, 19a.

To that end, the Utah Supreme Court conceded that the ordinance does not provide for a prompt judicial determination as required by several of the federal circuits interpreting this Court's language in *FW/PBS*, 493 U.S. 215. App., *infra*, 20a. Apparently believing the ordinance to permit prompt judicial access, however, the Court concluded that "until the United States Supreme Court clarifies the problematic concept [of prompt judicial review], a combination of provisional licensing and prompt judicial access will have to suffice." *Id.* Because the City had provided Haltom with a temporary business license to operate through the litigation, the Court took no issue with the fact that the plain language of the ordinance guaranteed no judicial review to future applicants. *Id.* In light of this decision, individuals in Utah desiring to exercise their free speech rights by engaging in adult enterprises are therefore left with no assurance that adverse licensing decisions will be promptly reviewed by a judicial officer.

2. The Midvale City licensing requirement applies only to businesses that are adult in nature. The ordinance itself defines one such business -- an adult bookstore -- in vague and overbroad terms:

> A. "Adult bookstore" or "adult video store" means a commercial establishment:
>
> 1. Which holds itself out to be such a business;
>
> 2. Which, as one of its principal business purposes, offers for sale or rental, for

> any form of consideration, any one or more of the following: books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides or other visual representations, the central theme of which depicts or describes sexual activities or specified anatomical areas; or instruments, devices or paraphernalia which are designated for use in connection with specified sexual activities, except for legitimate medically recognized contraceptives.

Ord. § 5.56.010(A)(1)-(2). While the terms "specified anatomical areas" and "specified sexual activities" are defined elsewhere in the ordinance, *see* Ord. § 5.56.010(V), (W), the term "principal business purpose" is not.

The lack of a workable definition for the term presents several distinct problems for individuals wishing to express themselves, as is their right under the First Amendment, while at the same time not subjecting themselves to unnecessary or unwanted governmental regulation. First, the lack of a precise meaning fails to give adequate notice to business owners as to precisely when the adult business licensing requirement is triggered. Because the ordinance requires only that the sale of adult products constitute one principal business purpose and not the principal business purpose, it is entirely possible that the licensing requirement may be construed to apply to retail establishments clearly not intending to operate as adult bookstores. Second, the failure to define "principal business purpose" in essence vests unbridled discretion in the hands of government officials to supply whatever definition of the term is most expedient for them. The possibility of censorship is heightened when, as here, the government can decide at will who is subject to a licensing requirement and who is not. These are, in fact, the traditional concerns that buttress this Court's vagueness and overbreadth doctrines. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The trial court in this case resolved the vagueness and overbreadth issues by finding the "principal business purpose" language to be clear and precise despite the lack of a specified definition for the term. App., *infra*, 69a. The Utah Supreme Court, however, circumvented the issue by finding that Haltom lacked standing to raise vagueness and overbreadth challenges to the ordinance. App., *infra*, 10a-11a. In so doing, the Court fashioned a new and unjustifiable standard for obtaining standing in a First Amendment case. Rather than applying this Court's traditional analysis that standing is obtained when an ordinance on its face implicates and threatens to prohibit speech or other protected conduct, the Court held that Haltom and others like him must demonstrate that they have suffered more onerous treatment or adverse consequences than a regular commercial establishment to facially challenge a licensing ordinance. *Id.* at 8a. The Court then presumed that Haltom suffered no harm from being required to apply for a sexually oriented business license and to comply with the substantive regulations contained in the ordinance. *Id.* at 9a. This analysis ignores the fact, long recognized by this Court, that the self-imposed chilling effect which results from a vague and overbroad regulation on speech is injury enough to justify relaxed standing requirements. *See Broadrick*, 413 U.S. at 613-14.

## REASONS FOR GRANTING THE PETITION

This Court should grant the petition for several reasons. First, as to the prompt judicial review requirement, the decision below that prompt access coupled with a temporary license satisfies the mandate conflicts with the decisions of four federal circuits who have ruled to the contrary. *See ZJ Gifts D-4 LLC v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995). This follows on the heels of a broader debate amongst the circuits as to the precise meaning of the prompt judicial review requirement. In fact, this Court has granted certiorari on at least two prior occasions to resolve the dispute. *See Thomas v. Chicago Park District*, 534 U.S. 316 (2002); *City News & Novelties, Inc. v. City of Waukesha*, 531 U.S. 278 (2001).[3]

It is clear from these decisions, if not from the decision of the Utah Supreme Court itself, that the lower courts are in need of guidance as to how the prompt judicial review requirement should be applied. App., *infra*, 25a. The Utah Supreme Court has compounded the need for clarification by creating a hybrid interpretation that blends the prompt determination and prompt access approaches. Diverging from the mere access courts but unwilling to require a prompt judicial resolution, the Utah Supreme Court held that the ability to timely access a judicial forum coupled with the issuance of a temporary license satisfies the prompt judicial review requirement. This splintering of applications, and the resultant opportunity for disparate results across jurisdictions, warrants this Court's attention.

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[3] *Thomas* and *City News* ultimately failed to produce a clear ruling on the prompt judicial review issue. *Thomas* was decided on grounds other than the *FW/PBS* procedural safeguards and *City News* was rendered moot when the business closed after certiorari was granted. *See Thomas*, 534 U.S. 316; *City News*, 531 U.S. 278.

Second, this Court should grant a writ of certiorari to clarify the scope of the relaxed standing requirements in First Amendment cases. The Utah Supreme Court again diverged from this Court's clear precedent by requiring that a litigant prove actual harm, as opposed to the hypothetical injury this Court has always allowed to suffice, to raise vagueness and overbreadth challenges to a local ordinance. App., *infra*, 8a. Indeed, some level of actual harm can be presumed when, as here, the government seeks to impose a facially invalid law against a defendant who never intended his expressive conduct to fall within its bounds. *See Broadrick*, 413 U.S. at 613-14. The Utah Supreme Court ignored this presumption, thereby elevating this Court's relaxed First Amendment standing requirements to that required of all other litigants. If allowed to stand, this rule could itself enact a chilling effect on parties' abilities to bring important First Amendment issues to the courts.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 2003

## APPENDIX A

## SUPREME COURT OF UTAH

**No. 20010794**

**[Filed May 16, 2003]**

| | |
|---|---|
| Midvale City Corporation,<br>Plaintiff and Appellee,<br><br>v.<br><br>John Haltom, an individual,<br>and Doctor John's, Inc., dba<br>Doctor John's Lingerie and<br>Novelty Boutique,<br>Defendants and Appellants. | ) |

Third District, Salt Lake

The Honorable Leslie A. Lewis

Attorneys: Peter Stirba, Corbin B. Gordon, Benson L. Hathaway, Salt Lake City, for plaintiff

John Fahle, San Antonio, Texas, and W. Andrew McCullough, Midvale, for defendants

**JUDGES:** JACKSON, Judge. Associate Chief Justice Durrant, Justice Russon, and Justice Wilkins concur in Judge Jackson's opinion. Justice Howe did not participate herein; Court of Appeals Judge Norman H. Jackson sat. DURRANT, Associate Chief Justice, concurring. Justice Russon and Justice Wilkins concur in Associate Chief Justice Durrant's opinion. DURHAM, Chief Justice, dissenting. Justice Russon acted on this opinion prior to his retirement.

## OPINION

JACKSON, Judge:

Defendants John Haltom and Doctor John's, Inc. (Dr. John's) appeal the trial court's issuance of a permanent injunction prohibiting Dr. John's from doing business in Midvale City. We affirm.

Associate Chief Justice Durrant, Justice Russon, and Justice Wilkins concur in Judge Jackson's opinion. However, Associate Chief Justice Durrant, joined by Justice Russon and Justice Wilkins, writes separately to set forth an alternative rationale for denying Dr. John's facial challenge, to address Dr. John's "as applied" challenge, and to clarify that the "good cause" exception does not need to be severed or given a limiting construction at this time.

## BACKGROUND

The operative facts of this case are undisputed. Defendants, acting primarily through John Haltom (Haltom), commenced business in Midvale City as Dr. John's Lingerie and Novelty Boutique (Dr. John's) in June of 2000, and applied for a commercial business license.

On June 14, 2000, Haltom filled out an application where he described his business as selling "lingerie, swimwear, roses & gifts." On June 15, 2000, Susan Shreeve (Shreeve), the Midvale City Business License Administrator, asked Haltom for a definition of the novelties he intended to sell at his business. Haltom described such items as "candles and lotions." He failed to mention a legion of sexual devices and hundreds of associated products.

On June 28, 2000, Shreeve visited Dr. John's on a business license inspection as scheduled by Haltom, and decided that some of the novelties constituted sexually oriented products as defined by the Midvale City Code. Shreeve admonished Haltom to apply for a sexually oriented business (SOB) license, and revealed that she could not approve his current business license, presumably because he had affirmatively misrepresented the items he was going to sell. On July 29, 2000, Dr. John's began operating without a business license.

On August 8, 2000, the district court entered a Temporary Restraining Order that prohibited defendants from operating. On the same date, the parties appeared, were represented by counsel, and reached a specific agreement, as reflected in the order, that if "Haltom remov[ed] the product lines which [were] considered sexual[ly] oriented as described in the SOB ordinance, . . . the City [would] not take further action in terms of the business operating and [would] consider the operation pursuant to the general business license application submitted on June 14, 2000."

For a brief time after the issuance of the Temporary Restraining Order, defendants removed all inventory covered by the ordinance, were issued a license, and continued to operate. On October 2, 20, and 24, and November 7, 2000, Midvale's City Code Enforcement Officer, Vicki Siegal, made inspections of Dr. John's and observed several hundred sexual gratification devices.

On November 21, 2000, the trial court held a hearing wherein it determined that Dr. John's was doing business as an SOB without an SOB license. Since defendants never submitted an application to Midvale City for an SOB license, the trial court issued a permanent injunction prohibiting it from doing business in Midvale City. Dr. John's appeals.

## ISSUES AND STANDARDS OF REVIEW

Dr. John's presents four challenges to the trial court's injunction. First, it challenges the trial court's determination that Midvale City's SOB ordinance was not unconstitutionally vague or overbroad. Second, it challenges the trial court's determination that injunctive relief is an available remedy in this case. Third, Dr. John's challenges the trial court's determination that the ordinance in question is a valid time, place, and manner restriction. Fourth, Dr. John's challenges the trial court's determination that the Utah Constitution does not offer broader protection than the United States Constitution.

These are all questions of law that we review for correctness. *See Grand County v. Emery County*, 969 P.2d 421, 422 (Utah 1998) (holding a trial court's conclusion that a statute or ordinance is constitutional presents a question of law reviewed for correctness); *Alta v. Ben Hame Corp.*, 836 P.2d 797, 804 (Utah Ct. App. 1992) (determining availability of injunctive relief as matter of law); *Whitmer v. City of Lindon*, 943 P.2d 226, 228 (Utah 1997) (reviewing trial court's ruling on state constitutional claims for correctness).

## ANALYSIS

We are called upon to decide whether a municipality may classify certain businesses as sexually oriented businesses, and require them to apply for a different license prior to engaging in business. There is no constitutional right to be free from classification. Accordingly, we hold that a city may classify businesses without implicating the *First Amendment* as long as the licensing process at issue does not adversely affect such businesses.

### I. STANDING

We first discuss whether Dr. John's had standing to file suit. The district court made no factual findings that could support standing, and after careful review, it appears that this issue is dispositive. "It is the burden of the 'party who seeks the exercise of jurisdiction in his favor' [to clearly allege] facts essential to show jurisdiction. If [it] fails to make the necessary allegations, [it has] no standing." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 608, 107 L. Ed. 2d 603 (1990) (citations omitted).

Because of the unique manner in which this case arose, the issue of standing is somewhat complicated. The issuance of an injunction conferred standing on Dr. John's as to licensing, and in effect, the constitutional challenge was bootstrapped in light of the dispute regarding classification. In essence, Dr. John's argues that unbridled discretion as to classification bears some relation to unbridled licensing discretion. We disagree.

A claim of prior restraint, valid or not, properly elicits a court's attention. "The judiciary is vigilant in its oversight of prior restraints because of the fear that they deprive or delay access to information, and because restraints that lack procedural safeguards may lead to content-based discrimination." *Graff v. City of Chicago*, 986 F.2d 1055, 1063 (7th Cir. 1993) (en banc). "While prior restraints are not unconstitutional per se . . . any system of prior restraint . . . comes to [the Court] bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc.*, 493 U.S. at 225, 110 S. Ct. at 604 (citations omitted) (first and second alteration in original).

A facial challenge is permitted where the licensing system "is directed narrowly and specifically at expression or conduct associated with expression," *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760, 108 S. Ct. 2138, 2145, 100 L. Ed. 2d 771 (1988), because when a licensing scheme implicates protected speech, "applicants [may] be intimidated into censoring their own speech by not applying for a license," *Graff*, 986 F.2d at 1073.

"[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *City of Lakewood*, 486 U.S. at 759, 108 S. Ct. at 2145. "To a large extent, then, one's ability to mount a facial challenge depends on the resolution of the substantive questions of whether speech is implicated and whether decision makers have excessive authority." *Graff*, 986 F.2d at 1061.

Even when a licensing scheme does not directly suppress communication, courts may properly entertain a facial challenge "where the licensing scheme vests unbridled discretion in the decisionmaker [or fails to confine the time in which a decision is made] and where the regulation is challenged as overbroad." *FW/PBS, Inc.*, 493 U.S. at 223, 110 S. Ct. at 603 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, 80 L. Ed. 2d 772, 104 S. Ct. 2118 & n.15, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118, 2125 & n.15, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)).

Still, courts are reluctant to entertain facial attacks because the statute may be declared unconstitutional in all instances. "The usual approach is to wait until a statute is applied in the suspected and offensive way." *Graff*, 986 F.2d at 1072 (citing *FW/PBS, Inc.*, 493 U.S. at 223, 110 S. Ct. at 603); *see also City of Lakewood*, 486 U.S. at 774, 108 S. Ct. at 2153 (White, J., dissenting). "We cannot sustain [a] facial attack unless the ordinance is 'substantially overbroad,' judged in relation to the statute's plainly legitimate sweep." *FW/PBS, Inc.*, 493 U.S. at 259, 110 S. Ct. at 622 (Scalia, J., dissenting) (citations omitted).

Thus, there are two ways in which an appellant can attain standing: (1) He can raise an overbreadth challenge, alleging either impermissible time restraints or unbridled discretion; or (2) he can raise an as-applied challenge, alleging that the ordinance as applied has harmed or is likely to harm his interests. Both attempts fail in this case.

First, Dr. John's cannot mount a facial challenge because, even in the most restrictive light, the statute only regulates the type of license for which one must apply. To mount a facial attack in a prior restraint case, an appellant must demonstrate that the ordinance at issue restricts, or will restrict, communication in some discernible manner. Dr. John's offers no evidence that the purpose of the ordinance is "to restrict stores, as opposed to addressing the secondary effects of such stores." *The Pack Shack, Inc. v. Howard County*, 138 Md. App. 59, 770 A.2d 1028, 1034 (Md. Ct. App. 2001).

Even if Dr. John's had demonstrated unbridled discretion, it must also show that it suffered more onerous treatment or adverse consequences than a regular commercial establishment. Otherwise, its challenge must fail.[1] "An injury-in-fact is an '"invasion of a legally protected interest" that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical.' . . . Causation requires a showing that the injury is '"fairly traceable to the challenged action of the defendant."'" *Z.J. Gifts v. City of Littleton*, 311 F.3d 1220, 1226 (10th Cir. 2002) (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)).

Dr. John's best argument is that it is "engaged in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*,

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[1] A plaintiff may have standing if an ordinance has a deterrent effect on legitimate expression. However, he may not manufacture standing, as Dr. John's has here, by picking a fight about proper classification.

442 U.S. 289, 298, 99 S. Ct. 2301, 2309, 60 L. Ed. 2d 895 (1979) (noting that standing exists when fear of criminal prosecution under allegedly unconstitutional statute is not imaginary or wholly speculative). The record indicates that the city attempted to enforce the ordinance against Dr. John's. The record also indicates, however, that had Dr. John's applied for the correct license he would have received one.

While normally, "applying for and being denied a license . . . is not a condition precedent to bringing a facial challenge to an unconstitutional law," it is a central factor where the law presents no constitutional concerns. *ACORN v. Municipality of Golden*, 744 F.2d 739, 744 (10th Cir. 1984). Thus, Dr. John's standing turns on problems arising from the application for an SOB license.

Dr. John's has not alleged any harm arising from the licensing proceedings except for the classification of the business as an SOB. It is thus "pure conjecture" that any harm will flow from this classification. *See Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002) (holding adult business did not have standing to challenge a city's provisions for granting a license because the business faced no adverse effects). Dr. John's may not manufacture standing by refusing to apply for the proper license simply because he disagrees with the preapplication process of classification. Ultimately, Dr. John's fails to allege that he will suffer any harm from the classification or the licensing process itself, and the record is devoid of anything that might affect Dr. John's.

Absent evidence that the classification functions as some governmental mark of Cain, the licensing requirements are constitutionally sound because they have no effect on businesses. "An ordinance requiring applicants to 'divulge such personal information as full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years' further[s the] 'substantial governmental interest in eradicating the secondary effects of sexually oriented businesses'" and does not violate the First Amendment. *Deja vu of Cincinnati v. Union Township*, 326 F.3d 791, 2003 U.S. App. LEXIS 7720, 2003 FED App. 0122P (6th Cir. 2003) (quotations and citations omitted).

The issues of discretionary classification and licensing may appear inextricably intertwined. Discretionary classification, however, does not implicate First Amendment protection, and discretionary licensing does so only when the process itself threatens some type of restriction on communication. The Midvale ordinance threatens no restriction whatsoever, save for the issuance of a different business license. "The city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229, 110 S. Ct. 596, 607, 107 L. Ed. 2d 603 (1990).

In sum, Dr. John's does not have standing to mount a facial attack on the Midvale ordinance because it has not shown that the ordinance has any deterrent effect on expression.[2] The Midvale ordinance requires a sexually oriented business to complete a business license application truthfully. Nothing in the record suggests that the ordinance restricts anything besides business owners who would operate without a license.

## II. OVERBREADTH AND VAGUENESS CLAIMS

Although standing is dispositive, we will analyze Dr. John's constitutional arguments insofar as they have been raised and insofar as Chief Justice Durham addresses them in her dissent.

### A. Sexual Novelties as Expressive Conduct

#### 1. Level of Scrutiny

Dr. John's argues that the sexual novelties at issue here amount to expressive conduct protected by the First Amendment. The trial court assumed arguendo that marginal protection applied to proceed with the substantive analysis. It is far from clear, however, that the sale of sexual devices deserves any First Amendment protection. Whatever the intellectual attraction may be in treating sexual devices as marginally protected "symbolic speech," it is clear from Haltom's testimony that Dr. John's interest in selling the products was purely commercial. A product's mere shock value does not trigger protected speech considerations, especially where the challenger would use the First Amendment as a prophylactic shield against valid government licensing regulations. The district court's use of mid-level scrutiny was thus overly generous to Dr. John's.

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[2] What Dr. John's actually challenges is the ability of a single city official to choose what kind of business license Dr. John's must have. While it is not clear on what grounds Dr. John's might challenge this aspect of Midvale's business licensing scheme, we are certain it has precious little to do with the Constitution of the United States.

As the district court held, absent some perceptible communicative or expressive function, the sexually oriented novelties should be examined using the lowest level of scrutiny afforded commercial speech. This would place the analysis squarely within the well-established *Hoffman* framework and defeat any claims of vagueness or overbreadth because the ordinance implicates no constitutionally protected conduct. *See generally Hoffman Estates v. Flipside*, 455 U.S. 489, 497, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1981). Dr. John's has failed to demonstrate any speech interest in the products it sells, and in fact affirmatively denied such an interest.[3] Accordingly, we decline to infer a communicative purpose in these products. Whatever level of speech or communicative quality may lie hidden in the sexual novelties Dr. John's sells, the government may require that Dr. John's apply for and receive a valid business license.

### 2. Symbolic Speech and Mid-Level Scrutiny

The United States Supreme Court has noted that certain sexually expressive items and conduct are "entitled to some quantum of protection under the First Amendment." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 285, 120 S. Ct. 1382, 1388-89, 146 L. Ed. 2d 265 (2000). The items sold at Dr. John's, however, are at best "symbolic speech," falling within the "outer ambit of the protection" and subject to evaluation under the *O'Brien* framework. *See United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). "The sordid business of pandering is constitutionally unprotected--. . . the sale of material solely to produce sexual arousal . . . does not escape regulation because the [material] has been dressed up as speech, or in other contexts might be recognized as speech." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26, 110 S. Ct. 596, 604-05, 107 L. Ed. 2d 603 (1990) (Scalia, J., concurring) (omission and second alteration in original). Thus, the district court was overly generous in applying mid-level scrutiny to the ordinance.

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[3] Indeed, any message of sexual expression or freedom is clearly secondary to the sale and subsequent use of the products. Whatever communicative aspects a sexual device might convey to its potential purchaser, its emotive impact is certainly incidental to its purchase and primary use. Justice Scalia's comment in *Pap's A.M.* is instructive: The statute was constitutional "'not because it survived some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it [was] not subject to First Amendment scrutiny at all.'" *City of Erie v. Pap's A.M.*, 529 U.S. 277, 285, 120 S. Ct. 1382, 1388-89, 146 L. Ed. 2d 265 (2000) (Scalia, J., concurring) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572, 111 S. Ct. 2456, 2463, 115 L. Ed. 2d 504 (1991) (Scalia, J., concurring)).

Under the four-part *O'Brien* content-neutral test used for analyzing symbolic speech, government regulation is sufficiently justified if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679.

The Midvale ordinance clearly passes constitutional muster because it is unrelated to expression and Dr. John's has failed to demonstrate any communication that it might actually suppress. Dr. John's residual claim that the ordinance is unconstitutionally vague because it fails to denote exactly what constitutes items of a "sexual nature" also fails. It is clear that the sexual novelties sold by Dr. John's represent items of a "sexual nature." *See IDK, Inc. v. County of Clark*, 599 F. Supp. 1402, 1410-11 (D. Nev. 1984) (holding any ambiguity in language classifying SOB and subsequent licensing requirements was not unconstitutionally vague where plaintiff's business was clearly an SOB).

That a city official may exercise discretion when classifying a business as an SOB is of no constitutional significance. Absent some type of different treatment, negative effect, or more onerous review process, city officials may classify a particular business any way they see fit. *See FW/PBS, Inc.*, 493 U.S. at 217, 110 S. Ct. at 604-05.

## B. Prior Restraint

### 1. Inapplicability of Prior Restraint

The district court was correct in ruling that the determinative issue was licensing rather than censorship, and that the doctrine of prior restraint was simply inapplicable. A ministerial action as to licensing is not presumptively invalid, and unlike most prior restraints, the city is not required to justify its decision in court on every occasion. *See FW/PBS, Inc.*, 493 U.S. at 229, 110 S. Ct. at 606-07. This distinction is important because the constitutionality of the statute turns on whether the licensing scheme functions as a content-neutral time, place, and manner restriction or a censoring wolf in sheep's clothing that would trigger *Freedman*'s rigid analysis.

Prior restraint is only at issue where the government exercises some form of censorship or indirectly represses the communication of ideas before their dissemination. Generally, ordinances that have failed under prior restraint have either delegated unbridled discretion to state officials or lacked sufficient time restraints for the licensing process. *See FW/PBS, Inc.*, 493 U.S. at 225-26, 110 S. Ct. at 604-05.

Prior restraint, notwithstanding Dr. John's nearly talismanic reliance on the mere assertion of the phrase, is not implicated by the ministerial requirement of a completed application. The mere invocation of the words "prior restraint" should not transmogrify a personal battle for laxer sexual mores into a constitutional issue, lest this court be led toward ruling on an issue of fundamental importance when Dr. John's harm is illusory and the restraint self-imposed. The record indicates that had Mr. Haltom truthfully filled out the proper form he would have been granted a license. As a practical matter, it is only Mr. Haltom's refusal to permit classification as an SOB that has allowed him to manufacture a fight with the government. Classification is clearly permissible without implicating any constitutional concerns. "The mere fact that . . . material protected by the First Amendment is subject to . . . licensing requirements is not a sufficient reason for invalidating [an] ordinance." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 62, 96 S. Ct. 2440, 2448, 49 L. Ed. 2d 310 (1976).

The narrow question presented in this case is whether a municipality may require an SOB to complete a different application than a nonsexually oriented business. This question presents no intellectual challenge. The First Amendment has nothing to do with a wholly ministerial requirement that a business apply for and obtain a valid business license, even if that license is somehow different from other commercial establishments. There is no fundamental right to be free from government classification of a business as a certain type, nor a ministerial licensing provision, so long as the process does not restrict or otherwise negatively impact business owners. *See Young*, 427 U.S. at 70-71, 96 S. Ct. at 2452 ("We hold that the State may legitimately use the content of [sexually explicit] materials as the basis for placing them in a different classification . . . .");

*Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 812, 108 S. Ct. 2667, 2686, 101 L. Ed. 2d 669 (1988) (Rehnquist, J., dissenting) (stating that "the statute differentiates between professional fundraisers and volunteers . . . [but] this fact alone does not impose an impermissible burden on protected speech, nor does it require that the licensing provisions be subjected to strict scrutiny").

Because municipalities may generally impose licensing requirements for purposes of regulation and zoning, and because the constitutionality of applying a more stringent application process for SOBs has been thoroughly examined by other courts, we forego a rigorous constitutional analysis and uphold the district court's decision. *See Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128, 1149 (W.D. Wis. 1998) (holding licensing requirement mandating disclosure of prior criminal convictions not unconstitutional prior restraint); *IDK, Inc. v. County of Clark*, 599 F. Supp. 1402, 1410-11 (D. Nev. 1984) (holding any ambiguity in language classifying SOB and subsequent licensing requirements not unconstitutionally vague where as applied to plaintiff it was clear that business was SOB); *St. Louis County v. B.A.P., Inc.*, 18 S.W.3d 397, 408-17 (Mo. Ct. App. 2000) (holding licensing ordinances governing SOBs sufficiently narrowly tailored to satisfy constitutional concerns). *See generally* Lee R. Russ, Annotation, *Validity of Statutes or Ordinances Requiring Sex-Oriented Businesses to Obtain Operating Licenses*, 8 A.L.R.4th 130 (1981) (listing recent cases where ordinances have been found to be both constitutional and unconstitutional as prior restraints).

### 2. Prior Restraint Analysis

The district court correctly determined that the Midvale licensing scheme does not constitute a prior restraint on speech. A court may not properly engage in a prior restraint analysis prior to determining the level of protection afforded the subject matter and the manner in which the ordinance restricts expression. To do so places the cart before the horse. The propriety of the analysis does not change because the regulation is facially attacked as unconstitutional. It is still necessary for the petitioner to demonstrate how the regulation affects expression, even if the restraint is hypothetical. In this case, even if the material were found to warrant protection under prior restraint analysis, the ordinance is constitutionally sound.

Prior restraint exists when speech or an analogue is conditioned upon the prior approval of public officials. Prior restraints are presumptively invalid because they typically involve "two evils that will not be tolerated": (1) the risk of censorship associated with the vesting of unbridled discretion in government officials; and (2) "the risk of indefinitely suppressing permissible speech" when a licensing law fails to provide for the prompt issuance of a license. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227, 110 S. Ct. 596, 605, 107 L. Ed. 2d 603 (1990). As the district court correctly held, the Midvale ordinance contains sufficient safeguards to redeem it from a facial assault.

In *FW/PBS, Inc.*, the Supreme Court applied *Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S. Ct. 734, 738-39, 13 L. Ed. 2d 649 (1965), to a film censorship regulation. *See FW/PBS, Inc.*, 493 U.S. at 225-27, 110 S. Ct. at 604-05.

*Freedman* provides a paradigmatic tripartite framework for analysis that is used in all prior restraint claims where the effect of the licensing provision is to restrict communication. *See, e.g., Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 802, 108 S. Ct. 2667, 2680-81, 101 L. Ed. 2d 669 (1988); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-64, 95 S. Ct. 1239, 1246-49, 43 L. Ed. 2d 448 (1975); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367-75, 91 S. Ct. 1400, 1403, 28 L. Ed. 2d 822 (1971).

Although the fractured opinion in *FW/PBS, Inc.* has been the subject of some controversy, the framework it provides for analyzing licensing regulations is controlling where the regulation has at least some potential to restrict expression. However, as the Supreme Court has made clear through decisions following *FW/PBS, Inc.*, mere business licensing does not trigger *Freedman* or *FW/PBS, Inc.* analysis absent some discernible restriction on expression. *See Riley*, 487 U.S. at 795-96, 108 S. Ct. at 2676-77; *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 62-63, 96 S. Ct. 2440, 2448-49, 49 L. Ed. 2d 310 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S. Ct. 925, 932, 89 L. Ed. 2d 29 (1986). Nevertheless, the instant case provides an appropriate forum in which to comment on the analysis and may provide municipalities with some guidance in this complex area of constitutional law.

*FW/PBS, Inc.* involves the following tripartite framework. First, the licensing decision must be made within a brief and determinate period; second, the process must assure a prompt judicial decision in case of denial; and third, the scheme must place the burden of litigating a denial on the government. *See FW/PBS, Inc.*, 493 U.S. at 227, 110 S. Ct. at 606.

Importantly, the plurality concluded that the third *Freedman* requirement, proving the unprotected nature of the speech, is inapplicable when a system of prior restraint does not require a public official to pass judgment on the content of any speech. *See* 493 U.S. at 229-30, 110 S. Ct. at 606-07.

The current problem does not involve the third requirement because it is only applicable where a form of censorship obtains and not where the content of the speech is merely incidental to the categorization of a business. That is, the third requirement applies where an official is making a yes or no licensing decision based on the content of the speech. *See id.* Here, the decision to categorize only results in the need for a different license and review process, rather than the ultimate decision regarding approval. Though there has been some disagreement in using an abbreviated *Freedman* test for content-neutral ordinances, it has never been suggested that a mere licensing regulation should be subject to the level of scrutiny Dr. John's suggests.

Thus, even if a prior restraint analysis were appropriate here, the Midvale ordinance is clearly constitutional. First, the ordinance is devoid of any unbridled official discretion that might render the ordinance constitutionally infirm. Second, there are no temporal ambiguities that might result in unreasonably delaying licensing. Lastly, though the ordinance does not guarantee a prompt judicial determination as required by *FW/PBS, Inc.*, until the United States Supreme Court clarifies this problematic concept, a combination of provisional licensing and prompt judicial access will have to suffice. *See City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 281, 121 S. Ct. 743, 746, 148 L. Ed. 2d 757 (2001) (noting that "courts have divided over the meaning of

*FW/PBS*'s 'prompt judicial review' requirement," granting certiorari to resolve the conflict, and subsequently finding issue not "genuinely presented" resulting in dismissal). Absent an action by the city to restrict business operation while the issue is litigated, the "decision" language is not dispositive because the city granted a de facto provisional license.

### a. Unbridled Official Discretion

Dr. John's suggests that unbridled official discretion exists in the Midvale ordinance. A prior restraint involving official discretion exists when speech is conditioned upon the prior approval of public officials. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556, 95 S. Ct. 1239, 1245-46, 43 L. Ed. 2d 448 (1975) (finding prior restraint where approval of musical was conditioned on municipal board's decision). Although officials may exercise discretion in deciding that products are sexually oriented, this is not the type of discretion prohibited by *FW/PBS, Inc. See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 61, 96 S. Ct. 2440, 2448, 49 L. Ed. 2d 310 (1976) (finding vagueness relating to decision regarding threshold "sexually explicit activity" acceptable where ordinance described threshold as "characterized by an emphasis" on such matter).

Dr. John's fails to allege any harm deriving from the classification itself. Moreover, the explicit and mandatory language of the ordinance and lack of individual discretion in the licensing process effectively negate any concern that an official may delay or short-circuit the procedure. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 2143, 100 L. Ed. 2d 771 (1988) (holding ordinance vesting discretion in official unconstitutional). Accordingly, the Midvale ordinance does not exhibit unbridled discretion.

### b. Fixed and Reasonable Time Restraints

The Midvale licensing scheme prescribes fixed and reasonable time periods for application review and does not contain language that might cause undue delay. The licensor must make the decision whether to issue the license within a specified time period and the appeals process subsequent to a denial is clear and unambiguous. The time periods for initial decision and appeal are mandatory and, at forty-five to sixty days, are well within limits that have been deemed acceptable by other courts. *See City of Colorado Springs v. Baby Dolls*, 896 P.2d 272, 282 (Colo. 1995) (upholding forty-day limit); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892 (6th Cir. 2000) (noting that under Supreme Court case law, processes including judicial review with "'potential delays of over five months are impermissible'" (citations omitted)).

Moreover, the ordinance requires timely review, specified appeals processes, and mandatory approvals in cases where the city fails to act. *See, e.g.*, Midvale City, Utah, Midvale City Code § 5.56.130(E) (1998) (if agency fails to approve within 15-day extension, premises shall be deemed approved). These provisions are of the type and kind specifically found to be reasonable under *FW/PBS, Inc.* and *Freedman*. *See generally* Lee R. Russ, Annotation, *Validity of Statutes or Ordinances Requiring Sex-Oriented Businesses to Obtain Operating Licenses*, 8 A.L.R.4th 130 (1981) (listing cases where ordinances have been found to be both constitutional and unconstitutional as prior restraints).

Chief Justice Durham argues that the relatively innocuous phrase "good cause" injects the possibility of indeterminacy into the licensing process. This is a mistake. First, the record contains no suggestion that the phrase has ever been invoked. Second, the phrase is omnipresent in the legal field, and is very likely surplusage as used here. Third, we can find no authority to support the concept that this phrase has ever been found to supply a level of indeterminacy necessary to void legislation. Finally, as we discuss below, even if we were to find this phrase problematic, the proper course of action would be to sever the offending words from the ordinance and leave intact the municipality's intent.

Even if we were to determine that the likely unintentional inclusion of the phrase "good cause" in the ordinance renders it constitutionally suspect, we must determine if that phrase is severable. The fact that the phrase has failed to attract judicial consideration in any similar context notwithstanding, the words are surplusage and clearly severable without affecting the legitimate purpose of the statute.

When reviewing the construction of statutes, "the general rule is 'that statutes, where possible, are to be construed so as to sustain their constitutionality. Accordingly, if a portion of the statute might be saved by severing the part that is unconstitutional, such should be done.'" *State v. Lopes*, 1999 UT 24, P18, 980 P.2d 191 (quoting *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 657 P.2d 1293, 1299 (Utah 1982)).

In determining whether an unconstitutional portion is severable, "we look to legislative intent." *Lopes*, 1999 UT 24 at P19. When the legislature's intent is not expressly stated, we "turn to the statute itself, and examine the remaining constitutional portion of the statute in relation to the stricken portion. If the remainder of the statute is operable and still furthers the intended legislative purpose, the statute will be allowed to stand." *Id.; see also Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 686 (Utah 1985) ("'Severability, where part of an act is unconstitutional, is primarily a matter of legislative intent[,]' which generally is determined by whether the remaining portions of the act can stand alone and serve a legitimate purpose." (citations omitted.)). "The test fundamentally is whether the legislature would have passed the statute without the objectionable [i.e., the unconstitutional] part . . . ." *Union Trust Co. v. Simmons*, 116 Utah 422, 429, 211 P.2d 190, 193 (1949); *see also Berry*, 717 P.2d at 686.

Although the ordinance does not include any indication of legislative intent regarding severability, it is indisputable that the ordinance is not only operable without the phrase, but completely unchanged. The phrase "good cause" is present in countless statutes, court rules, and contracts for no greater reason than word smiths believe it sounds lawyerly. In the present ordinance, the phrase serves no express or clear purpose, and is severable without any effect on the legitimate purpose of the ordinance. Thus, we must not smite the entire ordinance, leaving it neither root nor branch. Rather, pruning the vine would offer a more circumspect solution.

c. Prompt Judicial Review

Most problematic is *FW/PBS, Inc.*'s requirement that the licensing process provide for not just prompt judicial access, but rather prompt judicial determination. The obvious dilemma created by the United States Supreme Court has been the subject of vociferous debates among the federal circuits and resulted in a split of authority as to what the Court "actually meant." *See* J. David Guerrera, *The Meaning Of Prompt Judicial Review Under The Prior Restraint Doctrine After FW/PBS, Inc. v. City of Dallas*, 62 Brook. L. Rev. 1217 (1996) (explaining split among circuits).

Since municipalities clearly lack any control over the judiciary and the timeliness of a decision, the "prompt judicial review" requirement is a veritable Pandora's box because it contains the most dangerous potential for indefinite and thus unconstitutional delays. At least one circuit has noted that a provisional license or equivalent measure exorcises the demons of delay, and we agree. *See Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir. 2000). *But see Deja vu of Nashville v. Metro. Gov't of Nashville*, 274 F.3d 377, 403 n.8 (6th Cir. 2001) (reaching the opposite conclusion under a different panel of the Sixth Circuit).

Although it is indisputable that *FW/PBS, Inc.* mandates prompt judicial determination and not mere access, the remarkable split of authority among circuits, combined with the Supreme Court's refusal to rectify the acknowledged confusion in *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 285-86, 121 S. Ct. 743, 748, 148 L. Ed. 2d 757 (2001), persuades us to advance an interim solution such as that suggested by the Sixth Circuit in *Nightclubs, Inc.*, 202 F.3d at 894. Thus, any city procedure, however informal, that maintains existence of the status quo pending judicial review, will suffice until the United States Supreme Court devises some way out of this imbroglio.

## III. INJUNCTIVE RELIEF

### A. Appropriateness of Injunctive Relief

The trial court correctly determined that injunctive relief is available to a municipality under certain circumstances. Dr. John's claim that injunctive relief is always an inappropriate tool with which to halt the sale of expressive materials is misplaced. Although injunctive relief should be a measure of last resort and require a clear showing of irreparable harm, a municipality may obtain an injunction against a business selling protected material when that business operates without a license or violates some valid regulatory provision. *Ogden City v. Eagle Books*, 586 P.2d 436 (Utah 1978). Otherwise, any business with a newspaper rack could thwart the most mundane regulations under the guise of the First Amendment.

As we noted in *Eagle Books*, a city may employ a range of legal measures, including injunctions, to achieve compliance. Even with an otherwise valid regulation, however, when the materials sold represent clearly protected speech, injunctions must be a method of last resort. Moreover, in cases where expression is time sensitive, municipalities must exercise extreme caution in seeking court intervention, and courts must require a clear showing of irreparable harm before granting an injunction, however temporary. Regardless of any statutorily imposed time constraints, judicial review of any prior restraint claim must be expedited and err on the side of permitting the communication. Where applicable, interlocutory review should be sought and granted expeditiously so as to ensure a prompt judicial determination.

The nature of prior restraint magnifies any shortcomings in an ordinance where the administrative appeals process contains uncertainty regarding the method, manner, and time limits placed on the review. A constitutionally sound licensing scheme must provide an applicant with a swift administrative decision and an administrative appeals process that ensures prompt review and results. The Midvale ordinance contains none of the shortcomings found in constitutionally infirm regulations that have been examined by other courts.

## IV. TIME, PLACE, AND MANNER RESTRICTIONS

### A. Is the Ordinance a Valid Time, Place, and Manner Restriction?

Recent decisions by the United States Supreme Court indicate municipalities may regulate the placement and ownership of sexually oriented businesses through time, place, and manner restrictions. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440-41, 122 S. Ct. 1728, 1737, 152 L. Ed. 2d 670 (2002). Such restrictions are termed content-neutral since they lack any form of censorship. Some difficulty in this area has arisen, however, because the analytical framework between content-neutral and content-based regulations is not altogether clear. As Justice Brennan noted in *FW/PBS, Inc.*, where a regulation is aimed at a specific type of business, the distinction between censorship and licensing may be illusory. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 241, 110 S. Ct. 596, 613, 107 L. Ed. 2d 603 (1990) (Brennan, J., concurring). Finally, even if a licensing scheme is determined to be a content-neutral time, place, and manner regulation, when such an ordinance fails to provide adequate procedural safeguards, it is nonetheless unconstitutional.

*FW/PBS, Inc.* declined to elaborate on this issue, and as a result, courts are left with little to guide them in this area. *See id.* at 223, 110 S. Ct. at 603. However, other jurisdictions have held that an otherwise constitutional ordinance that seeks to regulate the placement and ownership of SOBs may properly be termed a content-neutral scheme. While the motives underlying a licensing scheme should be examined in regard to the stated goals of controlling secondary effects of SOBs, a municipality surely has a justifiable interest in obtaining information on the business owner and restricting licensing in this respect.

Content-neutral means the regulation "is not aimed at the content of the speech but rather at the secondary effects of [the SOB] on the surrounding community." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S. Ct. 925, 929, 89 L. Ed. 2d 29 (1986) (emphasis omitted). A regulation meets content-neutral time, place, and manner requirements if it (1) is content neutral; (2) is designed to serve a substantial government interest; and (3) does not unreasonably limit alternative avenues of expression. *See id.* at 46-55, 106 S. Ct. at 928-33.

The clear weight of jurisprudence in this area indicates that most courts consider the subject matter in this case as commercial speech and the regulation as a time, place, and manner restriction, resulting in a significantly lower level of scrutiny. *See id.* at 50, 106 S. Ct. at 930; *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68-69, 96 S. Ct. 2440, 2451-52, 49 L. Ed. 2d 310 (1976); *City of Erie v. Pap's A.M.*, 529

U.S. 277, 289, 120 S. Ct. 1382, 1391, 146 L. Ed. 2d 265 (2000); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770-71, 96 S. Ct. 1817, 1830, 48 L. Ed. 2d 346 (1976). Nevertheless, while licensing schemes pose less substantial risks to protected speech than censorship schemes, the fact that a licensing process differentiates between certain types of businesses militates in favor of a slightly higher level of scrutiny than would be afforded commercial speech. *See FW/PBS, Inc.*, 493 U.S. at 226-28, 110 S. Ct. at 605-06.

There is significant disagreement in this area, which is perhaps best exemplified by the fractured nature of the Supreme Court's opinion in *FW/PBS, Inc.*, where Justice White, joined by Chief Justice Rehnquist and Justice Scalia, noted that it was unwise to apply prior restraint doctrine to licensing schemes aimed at preventing secondary effects. This tension is apparent in prior restraint cases that have followed *FW/PBS, Inc.*, and likely reflects the fact that it is impossible to neatly separate a licensing scheme's good intentions from its practical effects. Even a perfectly constitutional licensing scheme with carefully drafted procedural safeguards may have an altogether unforeseeable, unconstitutional effect in certain instances, and it is folly to expect municipalities to surmount this intractable problem.

If any central premise can be gleaned from *FW/PBS, Inc.* and its progeny, it is that licensing schemes should be analyzed with an eye toward prior restraint doctrine simply because First Amendment jurisprudence is one tough nut. Furthermore, "if courts were compelled to wait until the government discriminated on the basis of content, they would lack the power to review licensing schemes in advance of their application and to require procedural safeguards." *Graff v. City of Chicago*, 986 F.2d 1055, 1067 (7th Cir. 1993) (en banc).

Under the most restrictive interpretation, the Midvale ordinance regulates not conduct, but rather ownership, and is therefore clearly a content-neutral time, place, and manner restriction unrelated to expression. *See Renton*, 475 U.S. at 48-49, 106 S. Ct. at 929. Because the city does not exercise discretion over any particular expressive speech, the regulation is a "ministerial action that is not presumptively invalid." *FW/PBS, Inc.*, 493 U.S. at 229, 110 S. Ct. at 607. Under the Renton test, the ordinance is constitutional if it is narrowly tailored to serve a substantial governmental interest and allows for alternative avenues of communication. *See Renton*, 475 U.S. at 50, 106 S. Ct. at 930. As it now stands, an SOB may locate anywhere as long as the owner completes the proper application.

Clearly "any effect on the overall expression is de minimus [sic]." *Pap's A.M.*, 529 U.S. at 294, 120 S. Ct. at 1393. "If States are to be able to regulate secondary effects, then such de minimus [sic] intrusions on expression cannot be sufficient to render the ordinance content based." *Id.* at 294, 120 S. Ct. at 1394. At best, Dr. John's sexually explicit products rise to the level of expression found in the nude dancing in *Pap's A.M.* and should be afforded no more than marginal protection, rather than the cherubim and a flaming sword Dr. John's proposes.

Having determined that the licensing scheme is a valid time, place, and manner restriction would generally not end the inquiry. If the city sought to regulate the time, place, and manner of expression, the court would need to measure the city's proposed interests in regulating conduct and the availability of other channels of communication. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 954-55, 74 L. Ed. 2d 794 (1983). However, although the ordinance classifies certain businesses differently, it does not treat them differently and thus need not be tested by the strict scrutiny applied when government action impinges upon expression. The policy, therefore, need only rationally further a legitimate state purpose, and classification of SOBs is surely such a purpose.

### B. Did Midvale Meet Its Burden?

Regulations that affect expressive conduct require that the municipality bear the burden of demonstrating that the restriction is necessary and no broader than necessary to achieve the stated purpose. Midvale's express purpose in adopting the ordinance was to regulate secondary effects of sexually oriented businesses.

Remarkably, although the restrictions require different licensing procedures, the ordinance is a restriction of the weakest sort. Viewing the ordinance as a mere licensing scheme, as the district court did, that implicates no perceptible restriction on expression, the burden the city must bear is minimal and is clearly met here.

## V. STATE CONSTITUTIONAL CLAIMS

Though Dr. John's correctly asserts that the state constitution can provide protections that differ from those available under the federal Constitution, the failure to define the nature of those protections is fatal to this claim. A litigant who would appeal to the protections afforded by Utah's constitution must adequately brief state constitutional law issues rather than "making federal constitutional arguments and then mentioning, as an afterthought, that the act in question 'also' violates state constitutional law, without further explanation." *State v. Davis*, 972 P.2d 388, 394 (Utah 1998) (Durham, J., dissenting).

This court has consistently declined to address state constitutional claims that have been inadequately briefed. *See State v. Norris*, 2001 UT 104, P28, 48 P.3d 872; *State v. Lafferty*, 749 P.2d 1239, 1247 (Utah 1988). "Nominally alluding to [state constitutional provisions] without any analysis before the trial court does not sufficiently raise the issue to permit consideration by this court on appeal." *State v. Johnson*, 771 P.2d 326, 328 (Utah Ct. App. 1989), *rev'd on other grounds, State v. Johnson*, 805 P.2d 761 (Utah 1991). For the court to consider a state constitutional claim, a litigant must at least define the nature of that protection and provide some argument as to how legal precedent supports its position. *See State v. Bobo*, 803 P.2d 1268, 1272-73 (Utah Ct. App. 1990).

Without analysis, the court can make no informed decision regarding whether the state constitutional provision in question was intended to mirror its federal counterpart, or whether it was intended to expand the scope of First Amendment guarantees. Dr. John's offers no analysis whatsoever in support of the argument for interpreting the Utah Constitution more broadly than the First Amendment. The fact that the Utah Supreme Court has interpreted article I, section 14 (search and seizure protections akin to the federal Fourth Amendment) does not mean that another, unrelated provision of the constitution should be expanded.

## VI. COMMERCIAL SPEECH

Because we determine that Dr. John's has no standing to facially attack the Midvale ordinance, it is unnecessary to address the Midvale commercial speech argument. We would decline to address it in any event, however, because it has not been adequately briefed, and it thus is not squarely before us. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 313 (Utah 1998) ("It is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief.").

## CONCLUSION

The trial court performed an admirable job of sorting through the facts and reaching the true issue: A business owner looking for a fight with government refused to complete an application that classified his business correctly.

We affirm the trial court's order. A contrary result would invite any business owner with a magazine rack and a grudge against government to invoke the beatified phrases "prior restraint" and First Amendment. The issue before the court is neither unique nor novel. Municipalities may require businesses to apply for and obtain business licenses prior to operating, and remain well within the boundaries of the constitution. While the First Amendment and the doctrine of prior restraint are deserving of aggressive protection, it is likely that the court will soon enough have a case appropriate for this purpose.

Associate Chief Justice Durrant, Justice Russon, and Justice Wilkins concur in Judge Jackson's opinion.

Justice Howe did not participate herein; Court of Appeals Judge Norman H. Jackson sat.

## CONCUR

DURRANT, Associate Chief Justice, concurring:

I concur in Judge Jackson's lead opinion upholding the Midvale city ordinance governing licensure of sexually-oriented businesses. I write additionally regarding the issue of standing to express an alternative rationale for denying Dr. John's facial challenge, to address its "as applied" challenge, and to express my view that the "good cause" exception does not need to be severed or given a limiting instruction at this time.

### I. STANDING--FACIAL CHALLENGE

Dr. John's facially challenges Midvale's ordinance governing licensure of sexually-oriented businesses as being unconstitutionally vague and overbroad. While I concur that Dr. John's lacks standing to mount a facial challenge, I base my decision on a different analysis than Judge Jackson. Judge Jackson concludes that Dr. John's lacks standing "to mount a facial attack on the Midvale ordinance because it has not shown that the ordinance has any deterrent effect on expression." However, Judge Jackson does not address the full scope of the ordinance in making his determination. Because Dr. John's challenges Midvale's ordinance facially, I believe we must look at the full scope of the ordinance when making this determination because different standing rules apply if a facial challenge involves First Amendment protections.

Midvale's ordinance requires adult bookstores, adult video stores, adult motion picture theaters, and other such businesses to obtain a sexually-oriented business license before operating. Midvale City, Utah, Code § § 5.56.010, 5.56.040 (1998). Because some books, magazines, periodicals, films, and videos "depicting or describing sexual activities or specified anatomical areas," *id.* § 5.56.010(A)(2), have been afforded some First Amendment protection, I believe Dr. John's facial challenge encompasses First Amendment rights.

When facial challenges are made on First Amendment grounds, normal standing requirements do not strictly apply. *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1226 (10th Cir. 2002). Nevertheless, to have standing in this context a party must still "'demonstrate its own cognizable injury in fact.'" *Id.* at 1227 (quoting *Nat'l Council for Improved Health v. Shalala*, 122 F.3d 878, 883 (10th Cir. 1997)). "This requirement is satisfied where the [party] is engaged 'in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.'" *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979)). While Midvale's ordinance may encompass protected speech, I do not believe that Dr. John's itself "is engaged 'in a course of conduct arguably affected with a constitutional interest.'" For this reason, I concur that Dr. John's lacks standing to mount a facial challenge to Midvale's ordinance.

According to the trial court's findings of fact, Dr. John's sells hundreds of sexual devices,[1] along with some candles, lotions, and lingerie. Additionally, it also sells a few sexually-explicit videos, books, and playing cards, but the number of these items are minimal in comparison to the other products sold by Dr. John's. Since the sale or rental of sexual devices yields no First Amendment protections, *FW/PBS v. City of Dallas*, 493 U.S. 215, 253-54, 107 L. Ed. 2d 603, 110 S. Ct. 596 & n.5, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990) (Scalia, J., concurring in part and dissenting in part), for the "simple reason" that such products "express[] nothing," *Yorko v. State*, 690 S.W.2d 260, 271 (Tex. Crim. App. 1985) (Teague, J., dissenting) (citations omitted), Dr. John's is not "engaged 'in a course of conduct arguably affected with a constitutional interest.'"

The mere inclusion by Dr. John's of some videos or books in its store's inventory does not alter this analysis because the minimal number of such items in its inventory in comparison to the constitutionally unprotected products sold by Dr. John's is insufficient to vest it with a constitutional interest. To conclude otherwise would mean that any business could mount a facial challenge to such licensing ordinances if it simply included a magazine rack with a few pornographic magazines on its premises. This would be contrary to standing requirements, especially since such a party could not "reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984) (citation omitted). Hence, Dr. John's lacks the requisite injury in fact to mount a facial challenge.

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[1] Midvale's ordinance requires businesses to obtain a sexually-oriented business license if the principal purpose of a business is to "offer[] for sale or rental . . . instruments, devices or paraphernalia which are designated for use in connection with specified sexual activities, except for legitimate medically recognized contraceptives." Midvale City, Utah, Code § § 5.56.010(A)(2), 5.56.040 (1998).

## II. "AS APPLIED" CHALLENGE

Although the court concludes that Dr. John's lacks standing to mount a facial challenge, I believe it is still necessary to address Dr. John's challenge of Midvale's ordinance as it has been applied to him. Since Judge Jackson does not expressly address this issue, I turn now to a discussion of Dr. John's "as applied" challenge. Dr. John's has been "permanently enjoined from operating a sexually oriented business within the boundaries of Midvale City, and from selling sexually oriented products . . . without first receiving a sexually oriented business license pursuant to Midvale City Code." It argues that the injunction is improper because Midvale's ordinance is unconstitutionally vague and overbroad as applied to it. I disagree.

### A. Vagueness Challenge

Under Midvale's ordinance, a business must obtain a sexually-oriented business license if the principal purpose of the business is to "offer[] for sale or rental . . . instruments, devices or paraphernalia which are designated for use in connection with specified sexual activities, except for legitimate medically recognized contraceptives." Midvale City, Utah, Code § § 5.56.010(A)(2), 5.56.040 (1998). Dr.

John's contends that the phrase "principal purpose" is unconstitutionally vague as applied to it.

On June 28, 2000, Midvale denied Dr. John's application for a general business license based on its conclusion that Dr. John's must apply for a sexually-oriented business license because it carried some sexually-oriented items. While it is unclear whether Dr. John's initially operated a sexually-oriented business when it first applied for a general business license, later actions by Dr. John's demonstrate that its principal purpose was to operate a sexually-oriented business. The trial court made several findings of fact that support this conclusion. First, following Midvale's initial inspection, Dr. John's added over 500 sexually-oriented devices and paraphernalia to its inventory. Second, it advertised its products in a sexually-oriented magazine and its advertisement depicted "a partially clad female in a provocative pose." Finally, Dr. John's anticipated making an eighty-percent profit on its sexually-oriented merchandise. Based on these findings, Dr. John's unquestionably was operating a sexually-oriented business and the phrase "principal purpose" was not unconstitutionally vague as applied to it.

### B. Overbreadth Challenge

Dr. John's also contends that Midvale's ordinance is overbroad as applied to it because it vests too much discretion in city officials with respect to its business license application. Specifically, it argues that the fact that city officials determined it had to apply for a sexually-oriented business license rather than a general business license demonstrates unbridled discretion.

Typically, overbreadth challenges are made on the grounds that an ordinance "vests too much discretion in licensing officials in granting or denying a license," *Z.J. Gifts D-4*, 311 F.3d at 1227, or it vests too much discretion in licensing officials because it fails "to place brief, specific time limits on the decision-making process," *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000) (citations omitted). While Dr. John's brief is not a model of clarity on this point, its overbreadth challenge does not appear to encompass either of these grounds. Instead it contends that the ordinance vests too much discretion in licensing officials because it authorizes Midvale officials to determine the type of license for which a business must apply. According to Dr. John's, this confers unbridled discretion on decision-makers. I am unaware of any cases that support Dr. John's contention. Moreover, the United States Supreme Court has implicitly recognized a city's authority to require sexually-oriented businesses to obtain a different type of license than other businesses. *See FW/PBS*, 493 U.S. at 223 (implicitly recognizing that city officials may require sexually-oriented businesses to obtain a different type of license from other businesses by not ruling that such licensing schemes are a per se violation of the Constitution). Finally, it is beyond question that Dr. John's was operating a sexually-oriented business. Hence, Dr. John's "as applied" challenge fails because Midvale's licensing officials did not have unbridled discretion when they determined the type of license for which Dr. John's must apply.

## III. "GOOD CAUSE" EXCEPTION

Under Midvale City Code section 5.56.360, if a person appeals a denial or a qualified approval of a license, the hearing board must hear the appeal "within twenty days from the date of the appeal *unless such time shall be extended for good cause.*" Midvale City, Utah, Code § 5.56.360(B) (1998) (emphasis added). Although the code sets forth a specific time frame in which an appeal must be heard, the "good cause" exception contains no corresponding time limit.

Having concluded that Dr. John's lacks standing to make a facial challenge to Midvale's ordinance, however, we need not address this issue.[2] Whether the "good cause" exception creates the possibility of an indeterminate delay such that it should be severed or given a limiting construction is a matter better left for another day. Because Judge Jackson's opinion may be somewhat ambiguous on this point, I expressly note my view that the "good cause" exception does not need to be severed or given a limiting construction at this time.

Justice Russon and Justice Wilkins concur in Associate Chief Justice Durrant's opinion.

## DISSENT

DURHAM, Chief Justice, dissenting:

I respectfully dissent.

While the trial court "[gave] the defendants the benefit of the doubt" and proceeded on the assumption that all the products sold by Dr. John's should be afforded some level of First Amendment protection, the lead opinion has accepted Midvale's contention that the sale of sexual novelties is "unprotected commercial speech which falls beyond the ambit of First Amendment protection." I disagree.

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[2] Because Dr. John's did not file an administrative appeal, and the "good cause" exception only applies to the administrative appeal process, Dr. John's also lacks standing to challenge this provision as applied to it. *See Z.J. Gifts D-4*, 311 F.3d at 1228.

In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-71, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976), the United States Supreme Court held that commercial speech enjoys First Amendment protection, albeit to a lesser extent than some other speech. Midvale's assertion that Dr. John's has "no expressive intent . . . beyond simply making a sale" misses the point, since for more than twenty-five years the Court has consistently held that "speech which does 'no more than propose a commercial transaction'" is protected by the First Amendment. 425 U.S. 748 at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385, 37 L. Ed. 2d 669, 93 S. Ct. 2553 (1973)). That a seller's interest in communicating regarding his wares is predominantly economic "hardly disqualifies him from protection under the First Amendment." *Id.* The underlying assumption that the expressive intent of the seller is dispositive is also mistaken, since the Court in *Virginia Board of Pharmacy* considered not only the seller's interest in communicating, but also the interests of consumers and society generally, concluding that it is essential to the proper functioning of a free market economy that individual decisions regarding the allocation of resources be informed and intelligent. 425 U.S. 748 at 765.

The expressive nature of the products being sold is also irrelevant to a determination of whether the doctrines of commercial speech apply. Whether products or services are expressive in nature is significant in determining whether a restriction on the sale of those products or services must satisfy the requirements of the *O'Brien* test for content-neutral time, manner, and place restrictions affecting mingled expressive and non-expressive conduct, but it has no relevance to the doctrine of commercial speech. *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Indeed, the cases that have recently refined the commercial speech doctrine have largely arisen out of disputes regarding advertising for products with little or no claim to expressive content. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 150 L. Ed. 2d 532, 121 S. Ct. 2404 (2001) (regulation of tobacco advertising and sales practices); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996) (ban on advertising the price of liquor); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980) (ban on advertising by electrical utility companies); *Virginia Bd. of Pharmacy*, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (pharmacists advertising the prices of prescription drugs). So long as commercial speech concerns lawful activity and is not misleading, that speech falls within the ambit of First Amendment protection. *Lorillard Tobacco*, 533 U.S. at 554; *44 Liquormart*, 517 U.S. at 500; *Central Hudson*, 447 U.S. at 566.[1]

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[1] The lead opinion apparently takes the view that selling sexual novelties, unlike advertising the sale of sexual novelties, is not speech at all, but rather completely non-expressive conduct outside the ambit of the First Amendment protection. This argument was not clearly made either in Midvale's briefs or in oral argument. A recent United States Supreme Court decision, moreover, entertains a rather broad definition of commercial speech. In *Lorillard*

The lead opinion's position on the nature of the underlying speech in this case allows it to avoid the special status accorded First Amendment rights in its analysis of standing. Facial challenges, while generally disfavored, are "permitted in the First Amendment context where [a] licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." *FW/PBS v. City of Dallas*, 493 U.S. 215, 223 (1990).That an inability to operate is due to a failure to apply for a license rather than to the licensing process is irrelevant: "One who might have had a license for the asking may . . . call into question the whole scheme of licensing." *Thornhill v. Alabama*, 310 U.S. 88, 97, 84 L. Ed. 1093, 60 S. Ct. 736 (1940). A licensing scheme that allows the postponement of administrative and judicial decisions regarding the issuance or denial of a license makes a facial challenge particularly appropriate: "where a scheme creates a 'risk of delay,' such that 'every application of the statute creates an impermissible risk of suppression of ideas,' we have permitted parties to bring facial challenges." *FW/PBS*, 493 U.S. at 223-24 (quoting *Freedman v. Maryland*, 380 U.S. 51, 55, 13 L. Ed. 2d 649, 85 S. Ct. 734

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*Tobacco* the United States Supreme Court applied the *Central Hudson* test for restrictions on commercial speech to a Massachusetts regulation requiring that tobacco products be displayed in locations accessible only to sales personnel. Because the regulation in question was found to pass constitutional muster under *Central Hudson*, the Court did not need to determine whether or not there is a "cognizable speech interest in a particular means of displaying . . . products," but in assuming, arguendo, that a First Amendment right might attach to product display, the Court has recently demonstrated an openness to expansive definitions of commercial speech. *Lorillard Tobacco*, 533 U.S. at 569.

(1965); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 n.15, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)).

It is evident to me from the foregoing that Dr. John's failure to apply for an appropriate business license does not affect his ability to challenge the ordinance. I also conclude that the prior restraint doctrine is applicable to licensing schemes for sexually-oriented businesses. I believe the lead opinion is mistaken in its conclusion that the ordinance is more properly analyzed as a content-neutral time, place, and manner restriction. While the holding of *FW/PBS* may be difficult to ascertain in some respects, it is clear that, Justice White's dissent notwithstanding, six justices agreed that such licensing schemes are to be analyzed as prior restraints.[2]

Dr. John's contends that the ordinance is unconstitutional on its face as a prior restraint, since it makes no mention of the availability of prompt judicial review in the event of an administrative decision denying a license. The lead opinion concludes that the prior restraint doctrine does not apply because it was Dr. John's failure to apply for a license, and not the licensing scheme, that resulted in the business's inability to operate, and because licensing schemes are properly analyzed as content-neutral time, place, and manner restrictions rather than as prior restraints.

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[2] While such a diversity of opinion inevitably leads to interpretive dilemmas, there is precedent to guide lower courts in deriving a holding from a fractured United States Supreme Court decision: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977). That an opinion is fragmented is not a justification for treating any one opinion from the court as being as authoritative as any other. Even if no single rationale commands a majority, a position clearly in the minority cannot be taken as the holding of the Court.

It is well-settled that our legal system accords special protections to speech. First Amendment jurisprudence is honeycombed with tests designed to limit the state's power to impinge on the expression of political and religious ideas, and in recent years the United States Supreme Court has held that some level of First Amendment protection is also available for types of speech not generally viewed as vital to a vibrant public discourse, such as commercial speech and nude dancing. *See, e.g., 44 Liquormart, Inc.*, 517 U.S. at 496 (stating that "the First Amendment protects the dissemination of truthful and nonmisleading commercial speech about lawful products and services"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000) (observing that nude dancing is expressive conduct, but falling only "within the outer ambit of the First Amendment's protection"). Government attempts to censor speech, even when part of efforts to isolate obscenity, which remains unprotected by the First Amendment, face a particularly heavy burden: "any system of prior restraints of expression comes to [the] Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963). While prior restraints are not unconstitutional *per se*, *Freedman v. Maryland*, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965), establishes three stringent safeguards that must be met in order for a prior restraint to pass constitutional muster. In order to be valid, a system of censorship must provide that

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

*FW/PBS*, 493 U.S. at 227 (restating *Freedman*, 380 U.S. at 58-59).

The Court has more recently adapted the *Freedman* rules to analyze schemes that, rather than prohibiting certain activities outright, create special licensing rules for businesses specializing in targeted classes of goods or services. In *FW/PBS*, the Court, reasoning that licensure schemes and systems of censorship pose related risks, used two of the three *Freedman* safeguards to analyze and strike down a Dallas licensing scheme for sexually-oriented businesses. "Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license." *FW/PBS*, 493 U.S. at 226. While at least six justices on the *FW/PBS* court indicated that licensing schemes for sexually-oriented businesses should be analyzed under the prior restraint doctrine, the fractured nature of the opinion has created substantial difficulties in understanding the extent to which the *Freedman* factors apply. Justice Brennan, joined by two other justices, maintained that all three *Freedman* factors should apply with their original force to a licensing scheme. *Id.* at 239. Justice White, joined by one other justice, contended that the licensing scheme at issue would be more properly analyzed as a content-neutral time, manner, and place restriction than as a prior restraint. *Id.* at 244. Justice Scalia argued that the Dallas licensing scheme should not be subject to First Amendment scrutiny at all. *Id.* at 253. Justice O'Connor, joined by two other justices, wrote the opinion generally treated as crucial for determining the holding of the case. In Justice O'Connor's view, because a "licensing scheme . . . does not present the grave 'dangers of a censorship system,'" only the first two *Freedman* safeguards are essential. *Id.* at 228 (quoting *Freedman*, 380 U.S. at 58). In Justice O'Connor's formulation, licensing schemes targeting sexually-oriented businesses may impose prior restraints only for a brief specified period and must also provide for prompt judicial review; the censor is required "to go to court and to bear the burden in court of justifying the denial." *Id.* While the federal circuits have split over the meaning assigned to "prompt judicial review," it is clear, at least, that a majority of justices on the Court agreed that licensure schemes targeting sexually-oriented businesses are properly analyzed under the prior restraint rubric.

Prior restraint doctrine is intended to prevent two constitutional evils: granting "unbridled discretion" to a government decision-maker, and failing to impose time limits within which a license or denial must be issued. *Id.* at 225-26. The *Freedman* procedural safeguards are intended to guard against these evils by requiring both a speedy conclusion to the administrative process for issuance or denial of licenses and the prompt availability of judicial review of the final administrative decision.

The Dallas ordinance regulating sexually-oriented businesses at issue in *FW/PBS* failed to make adequate provisions for either of the first two *Freedman* safeguards. The Dallas ordinance provided that a license would issue within thirty days provided an applicant met pertinent requirements, but also required that business premises pass several safety inspections prior to the issuance of the license. *FW/PBS*, 493 U.S. at 227. Since no time limits were provided within which those inspections were to be completed, the apparent certainty and brevity of the time line for administrative decisionmaking were undermined by the possibility that required inspections could come only after protracted delay, if at all. *Id.* The possibility that protected speech will be suppressed for a potentially indefinite period is precisely what the doctrine of prior restraint is intended to prevent: "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *Id.* at 227.

In amending the ordinance some nine months before the proceeding below, Midvale has been partially successful in curing the constitutional time limitation infirmities identified by the Court in *FW/PBS*. The ordinance now provides that the initial decision granting or denying a license must be made within forty-five days after receipt of an application. Midvale City, Utah, Code § 5.56.130(E). If an agency charged with reviewing the premises does not disapprove the premises within this period, the premises are deemed approved by that agency. *Id.*

While the particular defect from which the Dallas ordinance suffered in *FW/PBS* is avoided by this revision, the ordinance nonetheless falls short of the requirement that a licensing scheme "provide an effective limitation on the time within which the licensor's decision must be made." *FW/PBS,* 493 U.S. at 228. The revised ordinance does provide for a brief time frame within which the initial decision to grant or deny a license must be made, but it thereafter reintroduces the possibility of indeterminate delay in the administrative appeals process. License denials may be appealed to the business license administrator, who "shall schedule a hearing before the hearing board within twenty . . . days from the date of the appeal unless such time shall be extended for good cause." Midvale City, Utah, Code § 5.56.360(B) (emphasis added). Following the hearing the license administrator provides the city administrator with recommendations. "After the hearing, the license administrator shall have seven . . . working days, unless extended for good cause, in which to render findings of fact, conclusions of law, and recommended decision to the City Administrator." *Id.* § 5.56.360(E) (emphasis added). These provisions create the possibility that an administrative appeal could be delayed by government applications for extensions "for good cause." Because the appeals portion of the ordinance does not define what constitutes good cause or provide for any limitation on how long an extension may be, I believe the possibility for abuse exists.[3] Building some flexibility into the time lines governing the administrative appeals process does not necessarily create a prior restraint,

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[3] The ordinance's failure to provide clear time limits on its administrative appeals process also complicates its ability to satisfy the second *Freedman* requirement, the availability of prompt judicial review. An ordinance's provision for uncertain administrative review may make the availability of prompt judicial review equally uncertain; an ordinance is "inadequate under any

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interpretation of 'prompt judicial review' [when] it creates the risk that expressive activity could be suppressed indefinitely prior to any judicial review of the decision to deny a license." *Redner v. Dean*, 29 F.3d 1495, 1502 (11th Cir. 1994), *cert. denied*, 514 U.S. 1066, 131 L. Ed. 2d 560, 115 S. Ct. 1697. Judicial review, prompt or not, is generally unavailable under Utah law until administrative remedies have been exhausted: "parties must exhaust applicable administrative remedies as a prerequisite to seeking judicial review." *Housing Auth. v. Snyder*, 2002 UT 28, P11, 44 P.3d 724 (citing *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, P14, 34 P.3d 180 (internal citations omitted)).

The Midvale ordinance makes no provision for judicial review, and accordingly has nothing to say as to whether exhaustion is necessary as a prerequisite to judicial review. These omissions lead to an ambiguity as to the prerequisites that must be fulfilled before judicial review is available that is unacceptable in the area of First Amendment rights. It is essential that "the freedoms of expression . . . be ringed about with adequate bulwarks." *Bantam Books, Inc v. Sullivan*, 372 U.S. 58, 66, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963). The first *Freedman* factor is designed to provide an applicant with a swift administrative decision as to whether a license will be granted or denied, the second to ensure that prompt judicial review is available. A procedure that creates the possibility of indefinite delays in the administrative appeals process and then compounds that uncertainty by failing to provide a mechanism that will assuredly circumvent the faulty appeals process does not provide the guarantee of a speedy administrative determination required by United States Supreme Court precedent. The Midvale ordinance guarantees neither a swift resolution to the administrative process nor access to the courts as an alternative to a full administrative appeal.

but provisions so flexible that they could allow indefinite delays for unspecified reasons do. The ability to litigate the meaning of "good cause" or the length of a particular delay is no substitute for the brief and defined period for administrative decision-making that *FW/PBS* requires. If Midvale wishes to include some provision for permissible delays in the administrative appeals process, I believe it must provide guidance as to what constitutes good cause and include outside limits on delays so that the appeals process will be concluded within a brief, specified period. I believe the ordinance, as it now stands, fails to provide the first *Freedman* safeguard required by *FW/PBS*, and is therefore an unconstitutional prior restraint.

Justice Russon acted on this opinion prior to his retirement.

## APPENDIX B

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### IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

**Civil No. 000906120**
**Judge Leslie A. Lewis**

**[Filed September 20, 2001]**

**CITY OF MIDVALE, UTAH** )
Plaintiff, )
v. )
)
**JOHN HALTOM**, an individual, )
and **DOCTOR JOHN'S, INC.** )
**dba DOCTOR JOHN'S LINGERIE** )
**AND NOVELTY BOUTIQUE** )
Defendants. )
)

# FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial in the above matter was held on May 29-30, 2001 before the Honorable Leslie A. Lewis. Plaintiff was represented by its attorneys, Benson L. Hathaway Jr. and Gary R. Guelker. Defendants Were represented by their attorneys, W. Andrew McCullough and John Fahle. The Court, having reviewed the pleadings and legal memoranda submitted by the parties and having heard the testimony of witnesses and the arguments of counsel, now makes and enters the following Findings of Fact, Conclusions of Law and Final Judgment.

## FINDINGS OF FACT

1. Defendant John Haltom is an individual residing in Salt Lake County, Utah and owns one-half of Defendant Dr. John's, Inc.

2. Defendant Dr. John's, Inc. is a Utah corporation doing business in Salt Lake County, Utah as Dr. John's Lingerie and Novelty Boutique.

3. Defendants commenced business in Midvale City as Dr. John's Lingerie and Novelty Boutique, to capitalize on a perceived market opportunity in this State for the sale of adult novelties, adult videos and lingerie. This market opportunity is based on the Defendants' perception that the residents of Utah are provincial, repressed and in need of such items.

4. On June 14, 2000, Midvale City received an application from Defendant John Haltom for a commercial business license for "Doctor John's Inc.." On this application, Mr. Haltom described his business as "lingerie, swimwear,

roses & gifts." Mr. Haltom also agreed to the following on his application:

> I am aware that this application does not authorize conducting business until approved by Midvale City Corporation and a license has been issued; I also agree to conduct said business strictly in accordance with the laws and ordinances covering such businesses and that no other type of business will be conducted other than what has been stated above.

5. On June 15, 2000, Ms. Susan Shreeve, the Midvale City Business License Administrator, asked Mr. Haltom for a definition of the novelties he intended to sell at his new establishment. Mr. Haltom described such items as "candles and lotions." He failed to mention adult videos, adult magazines or sexual devices.

6. On June 28, 2000, Ms. Shreeve, accompanied by a Midvale City Building Official, visited Defendants' place of business, on a business license inspection, as scheduled by Mr. Haltom. During that inspection, Ms. Shreeve observed that approximately ten percent of Defendants' floor space was stocked with product. In addition to the originally described lingerie, swimwear, candles and lotions, Ms. Shreeve also observed playing cards with pictures of nude women, massage oils explicitly packaged for sexual purposes (i.e., "Mr. Prolong" and "Superglide"), and books with a specific sexual purpose (i.e. *The Picture Book of Sensual Love)*.

7. During this inspection, Ms. Shreeve informed Mr. Haltom that the above described products constituted sexually

oriented products as defined in the Midvale City Code ("M.C.C."). She informed Mr. Haltom that he would be required to apply for a sexually oriented business ("SOB") license, as opposed to a general business license, or remove the sexually oriented products from his shelves.

8. Upon return to her office, Ms. Shreeve wrote a letter dated June 28, 2000 to Mr. Haltom reiterating what she had observed during her inspection and the necessity to either apply for the proper license or remove the product from his shelves. In turn, she stated that she could not approve his business license application. Ms. Shreeve also enclosed a copy of Midvale City's Sexually Oriented Business License Ordinance.

9. In her June 28, 2000 letter, Ms. Shreeve, on behalf of Midvale City requested in writing that Mr. Haltom provide the City an inventory list of the products Defendants intended to sell. Mr. Haltom refused to do so.

10. On June 29, 2000, Ms. Shreeve received a call from Mr. Haltom in which he indicated that he was not going to remove the identified or related products from his shelves.

11. On July 19, 2000, Ms. Shreeve received a call from Mr. Haltom concerning Defendants' business license application. She again informed him that his license application had been denied and would not be approved unless he removed the sexually oriented products from his shelves or applied for the proper license.

12. On July 28, 2000, Mr. Haltom was personally notified by the Midvale City Administrator, Midvale Economic Development Director and Midvale City Attorney that Defendants would need to obtain a sexually oriented business license from the City of Midvale before commencing operation of their business.

13. Defendants never appealed the denial of their business license application as provided in Midvale City Code ("M.C.C.") § 5.04.050.

14. On July 29, 2000, Defendants began operating Dr. John's Lingerie and Novelty Boutique ("Dr. John's") located at 6885 South State Street, Midvale, Utah without obtaining a business license.

15. On August 8, 2000, this Court entered a Temporary Restraining Order which prohibited Defendants from operating the commercial establishment known as "Dr. John's Lingerie and Novelty Boutique" located at 6885 South State Street, Midvale, Utah.

16. On the date of the Temporary Restraining Order's issuance, the parties appeared and were represented by counsel before this Court and reached a specific agreement, as reflected in the Order, that if "Mr. Haltom removes the product lines which are considered sexual oriented as described in the SOB Ordinance,"... "the City will not take further action in terms of the business operating and will consider the operation pursuant to the general business license application submitted on June 14, 2000."

17. For a short time period after the issuance of the Temporary Restraining Order, Defendants did in fact remove all inventory covered by Midvale City's sexual oriented business license, were issued a general business license, and allowed to continue to operate.

18. On October 2, 20, and 24, 2000, and November 7, 2000, Midvale City's Code Enforcement Officer, Ms. Vicki Siegal, made inspections of Dr. John's relative to the sale of sexually oriented products.

19. On October 2, 2000, Ms. Siegal observed several hundred dildos in various shapes and colors on display for sale as well as a couple hundred vibrators. She also observed a number of vaginal replications for apparent use as a sexual gratification device, as well as anal beads and pleasure rings.

20. On October 20, 2000, Ms. Siegal observed that Dr. John's had increased the number of the above-mentioned sexually oriented products by several hundred items. Specifically, she observed two separate display walls that were stocked with approximately five-hundred separate dildos and twenty female genitalia devices, finger vibrators, pleasure rings, anal beads and other sexually oriented paraphernalia.

21. On October 24, 2000, Ms. Siegal observed similar items that She had observed on October 20, 2000, with the addition of approximately three hundred more genitalia devices including approximately two hundred more dildos and approximately one hundred more female genitalia replications. As before, these devices were all prominently displayed and were in various sizes, shapes and colors.

22. On November 7, 2000, all of the above items were still in the store and on display in similar amounts, quantities and items as Ms. Siegal had seen previously.

23. Other representatives of Midvale City inspected the premises at various times through early November 2000 and observed similar items in similar quantities and, in addition, adult videos, on display for sale.

24. Dr. John's Lingerie and Novelty Boutique has a large sign on its property which depicts a partially clad female in a provocative pose between the words "lingerie" and "novelty."

25. "Novelty" is a term of independent significance in Defendants' industry, defined and understood to include vibrators, dildos, "pocket pussies", oils and creams.

26. Dr. John's Lingerie and Novelty Boutique advertized in "Zex," a locally published sexually oriented magazine. The advertisement depicts a partially clad female in a provocative pose and makes references to "marital aids and adult videos."

27. Defendants conservatively anticipate a profit in the neighborhood of 80 percent on the sales of adult novelties and videos.

28. Defendants anticipate a profit of around 50 percent on its sales of lingerie.

29. Defendants have never submitted an application to Midvale City for a sexually oriented business license.

30. Defendants have not suffered any damages as a result of the enforcement actions taken by Midvale City.

## CONCLUSIONS OF LAW

1. Midvale City Code prohibits individuals from operating sexually oriented businesses within Midvale City without first obtaining a sexually oriented business license.

2. Midvale City Code defines a "sexually oriented business" as a commercial establishment "[w]hich holds itself out to be such a business" or "which, as one of its principal purposes, offers for sale or rental" sexually oriented products.

3. Dr. John's, Inc. d/b/a Dr. John's Lingerie and Novelty Boutique holds itself out to be a sexually oriented business.

4. Based on the nature, quantity and category of products being sold at Dr. John's, one of Dr. John's, Inc.'s, dba Dr. John's Lingerie and Novelty Boutique, principal purposes is the sale of sexually oriented products.

5. Dr. John's Lingerie and Novelty Boutique is therefore a"sexually oriented business" as defined and contemplated under the Midvale City Code.

6. Defendants violated M.C.C. § 5.56.040 by operating a sexually oriented business within Midvale City without having first obtained a sexually oriented business license.

7. The sale of lingerie and novelties by Dr. John's is unprotected commercial speech.

8. The videos sold by Dr. John's may qualify for marginal protection under the First Amendment.

9. The Midvale City Code's definition of a sexually oriented business is not unconstitutionally vague as it provides clear and precise notice and a clear indication to anybody reading it of precisely what type of conduct is prohibited without first obtaining a sexually oriented business license.

10. The licensing requirements for sexually oriented businesses contained in the Midvale City Code are not unconstitutionally overbroad.

11. The licensing requirements for sexually oriented businesses contained in the Midvale City Code do not constitute an unconstitutional prior restraint on speech.

12. As the Defendant failed to apply for a sexually oriented business license before engaging in its business operations, the prior restraint doctrine is not applicable to this case.

13. Further, since the Midvale City ordinance is aimed at preventing unfavorable secondary effects rather than the dissemination of expression, the prior restraint doctrine is inapplicable to this case.

DATED this 19th day of September, 2001.

BY THE COURT:

By: /s/ ____________________________
HONORABLE LESLIE A. LEWIS
Third Judicial District Court Judge

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of August, 2001, I caused to be served a true copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW**, by the method indicated below, to the following:

W. Andrew McCullough, Esq.
895 West Center Street
Orem, Utah 84057
Attorney for Defendants

(✓) U.S. Mail, Postage Prepaid

John Fahle
THE FAHLE LAW FIRM
628 South Presa
San Antonio, TX 78210

(✓) U.S. Mail, Postage Prepaid

/s/ ________________________

## APPENDIX C

### IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CASE NO. 000906120

[Filed August 7, 2001]

CITY OF MIDVALE, UTAH, )
Plaintiff, )
)
vs. )
)
JOHN HALTOM, an individual, and )
DOCTOR JOHN'S INC., dba )
DOCTOR JOHN'S LINGERIE AND )
NOVELTY BOUTIQUE, )
Defendants. )
)

### MEMORANDUM DECISION

Counsel for the plaintiff, counsel for the defendants and defendant John Haltom appeared before the Court for a two-day bench trial on March 29 and 30, 2001. The plaintiff presented its case and rested. The defendants offered evidence in support of their defenses and Counterclaim and then rested. Following closing arguments, the Court ruled in favor of the plaintiff and against the defendants (including a ruling dismissing their Counterclaim). The Court then informed counsel that its ruling would be reduced to a detailed Memorandum Decision.

Shortly after the Court began preparing this Memorandum Decision, it came to the Court's attention that a transcript of the trial had been ordered. The Court determined that a review of the trial transcript would be helpful before preparation of a thorough Memorandum Decision. The Court then informed counsel through its law clerk that it was awaiting the preparation of this transcript before issuing the Memorandum Decision. Unfortunately, it appears that while the transcript was promptly completed, delivery of the same to the parties and the Court was delayed because of a failure to pay the costs of preparing the transcript. The Court did not receive an official copy of the transcript until July 26, 2001.

The Court has now had an opportunity to review the transcript in its entirety. The Court has also reviewed the trial exhibits, examined the numerous legal authorities cited by counsel in support of their respective positions and considered the testimony and argument offered during the course of the trial. The Court now issues this Decision, based on the analysis set forth herein.

## LEGAL ANALYSIS

The defendants' principal argument is that the sale of sexually oriented materials, including sex toys or props, is a "clearly protected First Amendment expressive activity." The defendants present a facial challenge to the Midvale ordinance which seeks to regulate the marketing of such sexually oriented products through licensing. According to the defendants, this ordinance is unconstitutionally vague, overbroad and constitutes a prior restraint.

The Court begins by first examining whether the ordinance in question impinges on the defendants' First Amendment rights. During the trial, the plaintiff persuasively argued that the sexually oriented products which were being sold by the defendants did not qualify as protected speech. Relying on *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 497 (1981), the plaintiff argued that the sale of these products amounted to unprotected commercial speech, to which the challenges of overbreadth would not apply. *Id.* (". . .the overbreadth doctrine does not apply to commercial speech").

Further, given the trial testimony of Mr. Coil that the business was opened to supply this community with sexually oriented products (perceived to be unavailable in this "provincial area"); the plaintiff's argument requesting treatment of these products as unprotected commercial speech was particularly persuasive. The defendants argued that these products, particularly the videotapes, were intended to communicate an erotic message.

While the Court believes that the majority of the products sold by the defendants qualify as unprotected commercial speech, the Court recognizes that such items as the adult videos may qualify for marginal protection under the First Amendment. Therefore, rather than evaluating the products (never produced at trial) that were being sold at Dr. John's on an individual basis to determine whether they communicate a particular "message", the Court gives the defendants the benefit of the doubt and instead finds that all of these products may qualify for First Amendment protection.

The next issue before the Court is precisely what level of First Amendment protection is afforded to the sexually oriented products. The Court has reviewed a line of cases from the United States Supreme Court which demonstrate that sexually oriented materials are assigned only marginal First Amendment value and protection. In fact, such materials have consistently been subordinated and given considerably less protection than such recognized First Amendment areas as political, social and religious expressions. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976) (plurality opinion) ("There is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) ("it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate") (citations omitted); *City of Erie v. PAP's A.M.*, 529 U.S. 277, 281 (2000) (a case describing public nude dancing as expressive conduct, held that "...we think that it falls only within the outer ambit of the First Amendment's protection.").

In addition torecognizing that sexually oriented businesses enjoy only marginal protection with respect to the materials that they sell, the Supreme Court has also affirmed that municipalities, in the interest of preventing negative secondary effects (such as crime and conduct harmful to public health, safety and welfare, etc.), may regulate such businesses through content-neutral licensing ordinances. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Therefore, the next issue before the Court is whether the ordinance in question qualifies as a content-neutral licensing statute. The case of *U.S. v. O'Brien*, 391 U.S. 367 (1968), provides the framework for distinguishing whether an ordinance operates to judge the content of speech or whether it simply operates as a regulation of expressive conduct on a content-neutral basis.

This Court, in applying *U.S. v. O'Brien*, determines that the ordinance at issue, satisfies the four-prong test set forth in *O'Brien*, and determines specifically that the ordinance is designed to prevent secondary effects which are typically associated with the opening of sexually oriented businesses. In other words, the purpose of the ordinance is unrelated to the suppression of expression. *Erie*, 529 U.S. at 296. In fact, the ordinance itself proclaims that its purpose is to "... protect . . . citizens from increased crime and the preservation of its quality of life and property values and the character of the city's neighborhoods and businesses and to deter the spread of urban blight and to protect against the spread of sexually transmitted diseases." Section 5.56.000. Moreover, the ordinance's effect is mitigated and is de minimis in its impact on expression, because it permits the sale of sexually oriented products upon proper application and licensure. The Court therefore concludes that the ordinance is on its face a content-neutral licensing ordinance.

For the same reasons, the Court concludes that the prior restraints doctrine is simply not applicable in this case because the defendants' inability for operation of a sexually oriented business is strictly due to defendant's failure to apply for a sexually oriented business license.[1] The defendants' inability to operate such a business has nothing to do with the content of any protected speech which may be marginally attributable to the sexually oriented products that they were selling. In other words, there was no censorship involved. (See also fn. 1 for a discussion of how *Vance* differs from this case).

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[1] During closing argument defense counsel challenged the qualifications for licensure, including that the applicant not have been convicted or pled *nolo contendere* to a crime. Defense counsel painted a grave picture that such qualifications in a sense create "First Amendment outcast[s]." In support of this contention, the defense relies on *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

The Court concludes that *Vance* is not applicable to this case because the injunction in that case was based on the content of the expression (i.e. whether it was obscene). In other words, that case involved censorship, as opposed to this case where the civil "disabilities" are not based on the content of a particular expression. (As discussed in the body of this Decision, the Court has already decided that the ordinance is content-neutral).

In addition, this Court's review of the case law has revealed a number of cases upholding standards for licensure, including certain "disability" provisions such as those involved here. *See e.g. Airport Bookstore v. Jackson*, 242 Ga. 214, 222-23 (1978) (upholding 5-year disability for persons convicted of sex-related offenses); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 710 (upholding disability provision as narrowly tailored and constitutional); *DLS, Inc. v. City of Chattanooga*, 127 F.3d 403, 414-15 (6th Cir. 1997) (civil disabilities provision "does not allow City officials to exercise discretion by passing judgment on the content of protected speech... The decision-maker .... is constrained by objective criteria and the standards for licenses and permits under [the age and civil disability provisions] do not violate the constitution.").

Moreover, as pointed out by Justice White in his dissenting opinion in *FW/PBS*, 439 U.S. at 244-45, the prior restraint analysis does not apply where the ordinance was designed to prevent secondary effects and not the dissemination of ideas or expression. In discussing the Dallas ordinance in that case, Justice White noted that ". . .the ordinance is in no way aimed at regulating what may be sold or offered in the covered business. With a license, operators can sell anything but obscene publications. Without one - without satisfying the licensing requirements - they can sell nothing because the city is justified in enforcing the ordinance to avoid the likely unfavorable consequences attending unregulated sexually oriented businesses." *Id.* The prior restraint doctrine is inapplicable in this case for the same reasons; the ordinance in question is aimed at preventing secondary effect rather than the dissemination of expression.[2]

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[2] During closing argument, counsel for the defense argued that the prior restraint doctrine was applicable because the ordinance provides for an administrative appeal rather than judicial review. However, there is nothing to indicate that prompt judicial review is somehow abrogated under the ordinance and the defense failed to provide any support in the record for this proposition. Accordingly, the Court cannot address this issue other than to recognize that one of the "evils" of prior restraint is excessive delays until a decision is made on whether a license will be issued and ultimate administrative and then judicial review takes place. *FW/PBS*, 493 U.S. at 225-227. Clearly, a delay in this decision-making process is a time during which expression is suppressed. However, the Court simply cannot find any evidence in this case to support that

Finally, the Court examines the defendants' challenge to the statute for overbreadth and vagueness. As the Court articulated in its oral ruling, it concludes that the ordinance is reasonable in scope and purpose, and narrowly tailored and not over-broad. In addition, the ordinance is not vague because the language contained in the ordinance provides clear and precise notice and a clear indication to anybody reading the ordinance of precisely what type of conduct is prohibited absent a license, when a license for a sexually oriented business is necessary, etc. This Court specifically finds that defendant held "itself out" as a sexually oriented business, and had as its "principal purpose" the sale of sexually oriented products and the statute gave more than adequate guidance that this type of business needs to apply for and obtain a sexually oriented business license. Additionally, defendants were advised orally of this requirement by Midvale City employees.

The defendants should have been aware that their conduct fell within the scope of the ordinance. Neither Mr. Haltom nor his associates were novices in this business, having opened a number of commensurate operations in other states. Specifically, the defendants were aware that they were selling sexually oriented products, regardless of the title of

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such delays were imposed on the defendants or that such delays are inherent in the procedural scheme of the ordinance. With respect to the defendants, no evidence of delays was presented because the defendants never applied for a sexually oriented business license and therefore never began the process attendant to that review.

"novelties" that they assigned to these products.[3] Dr. John's clearly held itself out as a sexually oriented business, starting with the large provocative sign (depicting a partially clad female in a provocative pose) in front of the store. The sign depicted this provocative female between the words "lingerie" and "novelty." The store advertised in an adult magazine. The magazine ads referenced "marital aids and adult videos" combined with a picture of a female in a similar partially clad, provocative pose.

Again, it is noteworthy, with respect to the purpose of Dr. John's, that Mr. Coil (defendant's CFO) admitted in his testimony that the defendants' purpose in opening this business was to capitalize on the "market opportunities" existing in Utah because of the large number of sexually repressed people in this "provincial" community. (Trial Transcript at p. 175). Mr. Coil further admitted that had he not read an article about a "porn czar" being appointed in Utah, and perceived a need to fill a need for a sexually repressed populace; the decision to open Dr. John's in Utah, with its sexually oriented products, would never have been made. This testimony supports that a review of the ordinance should have made it clear to Mr. Haltom and his associates that Dr. John's had met both components of the ordinance and that he should therefore apply for a sexually oriented business license.

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[3] The Court notes that during the time of trial, the defense insisted that the sexually oriented products were only an "incidental" part of their business. The Court finds the opposite to be true, particularly when one considers the extremely high (80%) profit margin associated with these products.

Additionally, the testimony at trial was clear that over three-fourths of the profits at Dr. John's were generated by several "novelty products."

Based on the foregoing, the Court determines that the defendants are permanently enjoined from the sale of items defined as sexually oriented under the ordinance without first applying for and receiving a valid business license for a sexually oriented business. Also, as indicated in the beginning of this Decision, the Court finds against the defendants with respect to their Counterclaim in the entirety. Counsel for the plaintiff is to prepare a set of findings of fact and an order of permanent injunction, consistent with but not limited to this Decision.

Dated this 6 day of August, 2001.

/s/
LESLIE A. LEWIS
DISTRICT COURT JUDGE

## MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 7 day of August, 2001:

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/s/

## APPENDIX D

## SUPREME COURT OF UTAH

Case No. 20010794-SC

[Filed July 2, 2003]

Midvale City Corporation )
Plaintiff and Appellee, )
v. )
)
John Haltom, an individual, )
and Doctor John's, Inc., dba )
Doctor John's Lingerie and )
Novelty Boutique, )
Defendants and Appellants. )
)

## ORDER

This matter is before the court upon a Petition for Rehearing filed on May 29, 2003, by Appellant.

IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

FOR THE COURT:

July 2, 2003
Date

/s/
Christine M. Durham
Chief Justice

## CERTIFICATE OF MAILING

I hereby certify that on 7-3, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

JOHN FAHLE
THE FAHLE LAW FIRM
628 S PRESA
SAN ANTONIO TX 78210

W. ANDREW MCCULLOUGH
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SALT LAKE CITY, UT 84111

and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the court listed below:

THIRD DISTRICT, SALT LAKE
ATTN: SOPHIE ORVIN / KATHY SHUPE
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

By ______/s/______________

Deputy Clerk

Case No. 20010794-SC
THIRD DISTRICT, SALT LAKE, 000906120

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# APPENDIX E

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## MIDVALE CITY ORDINANCES

### Chapter 5.56

### SEXUALLY ORIENTED BUSINESSES

Sections:

5.56.010 Definitions.
5.56.020 Obscenity--Statutory provisions.
5.56.030 Location and zoning restrictions.
5.56.040 Business license required,
5.56.050 License requirements--Exemptions.
5.56.060 Legitimate artistic modeling.
5.56.070 Business categories--Number of licenses.
5.56.080 Employee licenses.
5.56.090 License--Application--Disclosures required.
5.56.110 License--Bond.
5.56.120 License--Premises location and name.
5.56.130 License--Issuance conditions.
5.56.140 License--Term.
5.56.150 License--Notice of change of information.
5.56.160 License--Transfer limitations.
5.56.170 License--Display.
5.56.180 License--Statement in advertisements.
5.56.190 Regulations and unlawful activities.
5.56.200 Outcall services--Operation requirements.
5.56.210 Adult business--Design of premises.
5.56.220 Nude entertainment business--Design of premises.

5.56.230 Nude entertainment business--Location restriction.
5.56.240 Seminude dancing bar--Operation prerequisites.
5.56.2.50 Seminude dancing bar--Performer restrictions.
5.56.260 Nude and seminude dancing agencies.
5.56.270 Performers--Prohibited activities.
5.56.280 Performers--Costume regulations.
5.56.290 Stage requirements.
5.56.300 Patrons--Prohibited activities.
5.56.310 Nudity--Defenses to prosecution.
5.56.320 Existing businesses--Compliance time limits.
5.56.330 Violation--Injunction.
5.56.340 Violation--License suspension or revocation.
5.56.350 Effect of license revocation.
5.56.360 Appeals.
5.56.370 Violation--Penalty.

5.56.010 Definitions. For the purpose of this chapter, the following words shall have the following meanings:

A. "Adult bookstore" or "adult video store" means a commercial establishment:

1. Which holds itself out to be such a business;

2. Which, as one of its principal purposes, offers for sale or rental, for any form of consideration, any one or more of the following: books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides or other visual representations, the central theme of which depicts or describes sexual activities or specified anatomical areas; or instruments, devices or paraphernalia which are designated for use in connection with specified sexual activities, except for legitimate medically recognized contraceptives.

B. "Adult business" means an adult motion picture theater, adult bookstore or adult video store.

C. "Adult motion picture theater" means a commercial establishment which:

1. Excludes minors from the showing of two consecutive exhibitions; repeated showings of any single presentation shall not be considered a consecutive exhibition; or

2. As its principal business, shows, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions which are primarily characterized by the depiction or description of specified sexual activities or specified anatomical areas.

D. "Adult theater" means a theater, concert hall, auditorium, or similar commercial establishment which:

1. Excludes minors from the showing of two consecutive exhibitions; repeated performance of the same presentation shall not be considered a consecutive exhibition;

2. As its principal business, features persons who appear in live performances in a state of nudity or which are characterized by the exposure of specified anatomical areas or by specified sexual activities.

E. "Business license authority" means the city's business license supervisor or designee.

F. "Employ" means hiring an individual to work for pecuniary or any other form of compensation, whether such person is hired on the payroll of the employer, as an independent contractor, as an agent, or in any other form of employment relationship.

G. "Escort" means any person who, for pecuniary compensation, dates, socializes, visits, consorts with or accompanies or offers to date, consort, socialize, visit or accompany another or others to or about social affairs, entertainment or places of amusement, or within any place of public or private resort or any business or commercial establishment or any private quarters. "Escort" shall not be construed to include persons who provide business or personal services such as licensed private nurses, aides for the elderly or handicapped, social secretaries or similar service personnel whose relationship with their patron is characterized by a bona fide contractual relationship having a duration of more than twelve hours and who provides a service not principally characterized as dating or socializing. "Escort" shall not be construed to include persons providing services such as singing telegrams, birthday greetings or similar activities characterized by appearances in a public place, contracted for by a party other than person for whom the service is being performed and of a duration not longer than one hour.

H. "Escort service" means an individual or entity who, for pecuniary compensation, furnishes or offers to furnish escorts, or provides or offers to introduce patrons to escorts.

I. "Escort service runner" means any third person, not an escort, who, for pecuniary compensation, acts in the capacity of an agent or broker for an escort service, escort or patron by contacting or meeting with escort services, escorts or patrons at any location within the city, whether or not such third person is employed by such escort service, escort, patron, or by another business, or is an independent contractor or self-employed.

J. "Lewdness" means an individual who exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area while in a public place.

K. "Nude and seminude dancing agency" means any person, agency, firm, corporation, partnership, or any other entity or individual which furnishes, books or otherwise engages or offers to furnish, book or otherwise engage the service of a professional dancer licensed pursuant to this chapter for performance or appearance at a business licensed for nude entertainment, seminude dancing bars, or adult theaters.

L. "Nude entertainment business" means a business, including adult theater, where employees appear in the presence of patrons of the business in a state of nudity or seminudity. A business shall also be presumed to be a nude entertainment business if the business holds itself out as such a business.

M. "Nudity" or "state of nudity" means a state of dress in which the nipple and areola of the female breast, or male or female genitals, pubic region or anus are covered by less than the covering required in the definition o f seminude.

N. "Outcall services" means services of a type performed by a sexually oriented business employee outside of the premises of the licensed sexually oriented business, including but not limited to escorts, models, dancers and other similar employees.

O. "Patron" means any person who contracts with or employs any escort services or escort or the customer of any business licensed pursuant to this chapter.

P. "Pecuniary compensation" means any commission, fee, salary, tip, gratuity, hire, profit, reward, or any other form of consideration.

Q. "Person" means any person, unincorporated association, corporation, partnership or other legal entity.

R. "Seminude" means a state of dress in which opaque clothing covers no more than the nipple and areola of the female breast, and the male or female genitals, pubic region and anus shall be fully covered by an opaque covering no narrower than four inches wide in the front and five inches wide in the back which shall not taper to less than one inch wide at the narrowest point.

S. "Seminude dancing bars" means any business licensed as a private club or tavern, which permits dancing, modeling or other performance or appearance however characterized, in a state of seminudity.

T. "Sexually oriented business" means nude entertainment businesses, sexually oriented outcall services, adult businesses, seminude dancing bars and seminude dancing agencies, as defined by this chapter.

U. "Sexually oriented business employees" means those employees who work on the premises of the sexually oriented business in activities related to the sexually oriented portion of the business. This includes all managing employees, dancers, escorts, models, and other similar employees whether or not hired as employees, agents or as independent contractors. Employees shall not include individuals whose work is unrelated to the sexually oriented portion of the business, such as janitors, bookkeepers and similar employees. Sexually oriented business employees shall not include cooks, serving persons, bartenders and similar employees, except where they may be managers or supervisors of the business. All persons making outcall meetings under this chapter, including escorts, models, guards, escort runners, drivers, chauffeurs and other similar employees, shall be considered sexually oriented business employees.

V. "Specified anatomical areas" means the human male or female pubic area or anus with less than a full opaque covering, or the human female breast from the beginning of the areola, papilla or nipple to the end thereof with less than full opaque covering.

W. "Specified sexual activities" means:

1. Acts of masturbation, human sexual intercourse, sexual copulation between a person and a beast, fellatio, cunnilingus, bestiality, pederasty, buggery, or any anal copulation between a human male and another human male, human female, or beast;

2. Manipulating, caressing or fondling by any person of the genitals of a human, the pubic area of a human, and the uncovered female nipple and areola;

3. Flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of the one so clothed. (Ord. 11-09-99A §1, 1999; Ord. 4-3-98 §2, 1998; Ord. 11-22-88A §1, 1988)

5.56.020 Obscenity--Statutory provisions. Notwithstanding anything contained in this chapter, nothing in this chapter shall be deemed to permit or allow the showing or display of other applicable federal or state statutes prohibiting obscenity. (Ord. 11-22-88A §2, 1988)

5.56.030 Location and zoning restrictions. It is unlawful for any sexually oriented business to do business at any location within the city not zoned for such business. (Ord. 11-22-88A §3, 1988)

5.56.040 Business license required. It is unlawful for any person to operate a sexually oriented business, as specified below, without first obtaining a sexually oriented business license. The business license shall specify the type of business for which it is obtained. (Ord. 11-22-88A §4, 1988)

5.56.050 License requirements--Exemptions. The provisions of this chapter shall not apply to any sex therapist or similar individual licensed by the state to provide bona fide sexual therapy or counseling, licensed medical practitioner, licensed nurse, psychiatrist, nor shall it apply to any educator licensed by the state for activities in the classroom. (Ord. 11-22-88A §5, 1988)

5.56.060 Legitimate artistic modeling. A. The city does not intend to unreasonably or improperly prohibit legitimate modeling which may occur in a state of nudity for purposes protected by the First Amendment or similar state protections. The city does intend to prohibit prostitution and related offenses occurring under the guise of nude modeling. Notwithstanding the provisions of Section 5.56.190(K), a licensed outcall employee may appear in a state of nudity before a customer or patron providing that the contract for such appearance was entered into between the customer or patron and the employee at least twenty-four hours before the nude appearance. All of the other applicable provisions of this chapter shall still apply to such nude appearance.

B. In the event of a contract for nude modeling or appearance signed more than forty-eight hours in advance of the modeling or appearance, the individual to appear nude shall not be required to obtain a license pursuant to this chapter. During such unlicensed nude appearance, it is unlawful to:

1. Appear nude or seminude in the presence of persons under the age of eighteen;
2. Allow, offer or agree to any touching of the contracting party or other person by the individual appearing nude;

3. Allow, offer or agree to commit prostitution, solicitation of prostitution, solicitation of a minor, or committing activities harmful to a minor;

4. Allow, offer, commit or agree to any sex act as validly defined by city ordinances or state statute;

5. Allow, offer, agree or permit the contracting party or other person to masturbate in the presence of the individual contracted to appear nude;

6. Allow, offer or agree for the individual appearing nude to be within five feet of any other person while performing or while nude or seminude. (Ord. 11-22-88A §6, 1988)

5.56.070 Business categories--Number of licenses. A. It is unlawful for any business premises to operate or be licensed for more than one category of sexually oriented business, except that a business may have a license for both outcall services and nude and seminude dancing agency on the same premises.

B. The categories of sexually oriented businesses are: outcall services, adult businesses, nude entertainment businesses, seminude dancing bars, nude and seminude dancing agency. (Ord. 11-22-88A §7, 1988)

5.56.080 Employee licenses. It is unlawful for any sexually oriented business to employ, or for any individual to be employed by a sexually oriented business in the capacity of a sexually oriented business employee, unless that employee first obtains a sexually oriented business employee license. (Ord. 11-22-88A §8, 1988)

5.56.090 License--Application--Disclosures required. Before any applicant may be licensed to operate a sexually oriented business or as a sexually oriented business employee pursuant to this chapter, the applicant shall submit, on a form to be supplied by the city license official, the following:

A. The correct legal name of each applicant, corporation, partnership, limited partnership or entity doing business under an assumed name;

B. If the applicant is a corporation, partnership or limited partnership, or individual or entity doing business under an assumed name, the information required below for individual applicants shall be submitted for each partner and each principal of an applicant, and for each officer, director and any shareholder (corporate or personal) of more than ten percent of the stock of any applicant. Any holding company, or any entity holding more than ten percent of an applicant, shall be considered an applicant for purposes of disclosure under this chapter.

C. All corporations, partnerships or noncorporate entities included on the application shall also identify each individual authorized by the corporation, partnership or noncorporate entity to sign the checks for such corporation, partnership or noncorporate entity;

D. For all applicants or individuals, the application must also state:

1. Any other names or aliases used by the individual,
2. The age, date and place of birth,
3. Height and weight,
4. Color of hair and eyes,
5. Present business address, not to include post office box, and telephone number,
6. Present residence, not to include post office box, and telephone number,
7. Utah drivers license or identification number,
8. Social security number;

E. Acceptable written proof that any individual is at least eighteen years of age or, in the case of employees to be employed in businesses where a different age is required, proof of the required age;

F. Attached to the form as provided above, two color photographs of the applicant clearly showing the individual's face and the individual's fingerprints on a form provided by the city police department. For persons not residing in the city, the photographs and fingerprints shall be on a form from the law enforcement jurisdiction where the person resides. Fees for the photographs and fingerprints shall be paid by the applicant directly to the issuing agency;

G. For an individual to obtain a sexually oriented business employee license as an escort, or as a nude entertainer, shall provide a certificate from the Salt Lake County health department, stating that the individual has, within thirty days immediately preceding the date of the application, been examined and found to be free of any contagious or communicable diseases;

H. A statement of the business, occupation or employment history of the applicant for three years immediately preceding the date of the filing of the application;

I. A statement detailing the license or permit history of the applicant for the five-year period immediately preceding the date of the filing of the application, including whether such applicant previously operating or seeking to operate, in this or any other county, city, state or territory, has ever had a license, permit or authorization to do business denied, revoked or suspended, or has had any professional or vocational license or permit denied, revoked or suspended. In the event of any such denial, revocation or suspension, State the date, the name of the issuing or denying jurisdiction, and state in full the reasons for the denial, revocation or suspension. A copy of any order of denial, revocation or suspension shall be attached to the application;

J. All criminal convictions or pleas of nolo contendre, except those which have been expunged, and the disposition of all such arrests for the applicant, individual or other entity subject to disclosure under this chapter, for five years prior to the date of the application. This disclosure shall include identification of all ordinance violations, excepting minor traffic offenses (any traffic offense designated as a felony shall not be construed as a minor traffic offense), stating the date, place, nature of each conviction or plea of nolo contendre, and sentence of each conviction or other disposition; identifying the convicting jurisdiction and sentencing court; and providing the court identifying case numbers or docket numbers. Application for a sexually oriented business employee license shall constitute a waiver of disclosure of any criminal conviction or plea of nolo contendre for the purposes of any proceeding involving the business or employee license;

K. In the event the applicant is not the owner of record of the real property upon which the business or proposed business is or is to be located, the application must be accompanied by a notarized statement from the legal or equitable owner of the possessory interest in the property specifically acknowledging the type of business for which the applicant seeks a license for the property. In addition to furnishing such notarized statement, the applicant shall furnish the name, address and phone number of the owner of record of the property, as well as the copy of the lease or rental agreement pertaining to the premises in which the service is or will be located;

L. A description of the services to be provided by the business, with sufficient detail to allow reviewing authorities to determine what business will be transacted on the premises, together with a schedule of usual fees for services to be charged by the licensee, and any rules, regulations or employment guidelines under or by which the business intends to operate. This description shall also include:

1. The hours that the business or service will be open to the public, and the methods of promoting the health and safety of the employees and patrons and preventing them from engaging in illegal activity,

2. The methods of supervision preventing the employees from engaging in acts of prostitution or other related criminal activities,

3. The methods of supervising employees and patrons to prevent employees and patrons from charging or receiving fees for services or acts prohibited by this chapter or other statutes or ordinances,

4. The methods of screening employees and customers in order to promote the health and safety of employees and customers and prevent the transmission of disease, and prevent the commission of acts of prostitution or Other criminal activity. (Ord. 11-22-88A §9, 1988)

5.56.110 License--Bond. Each application for a Sexually oriented business license shall post with the city's licensing official a cash or corporate surety bond payable to Midvale City Corporation in the amount of two thousand dollars. Any fines assessed against the business, officers or managers for violations of city ordinances shall be taken from this bond if not paid in cash within ten days after notice of the fine, unless an appeal is filed as provided by this chapter. In the event the funds are drawn against the cash or surety bond to pay such fines the bond shall be replenished to two thousand dollars within fifteen days of the date of notice of any draw against it. (Ord. 11-22-88A §11, 1988)

5.56.120 License--Premises location and name. A. It is unlawful to conduct business under a license issued pursuant to this chapter at any location other than the licensed premises. Any location to which telephone calls are automatically forwarded by such business shall require a separate license.

B. It is unlawful for any sexually oriented business to do business in the city under any name other than the business name specified in the application. (Ord. 11-22-88A §t2, 1988)

5.56. 130 License--Issuance conditions. The city business license official shall approve the issuance of a license to the applicant within thirty days after receipt of any application, unless the official finds one or more of the following:

A. The applicant is under eighteen years of age or any higher age, if the license sought requires a higher age;

B. The applicant is overdue in payment to the city of taxes, fees, fines or penalties assessed against the applicant or imposed on the applicant in relation to a sexually oriented business;

C. The applicant has been convicted of a violation of a provision of this chapter within two years immediately preceding the application; however, the fact that a conviction is being appealed shall have no effect on the denial;

D. The premises to be used for the business have not been approved by the Salt Lake County health department, the city fire department, the city police department, the city building officials or the city zoning officials as being in compliance with applicable laws and ordinances of the city. Businesses located outside of the corporate boundaries of the city, but requiring a license under this chapter, may be denied a license pursuant to this chapter if the business does not have a valid business license to conduct business at the business location;

E. The license fees required by this chapter or by other ordinances have not been paid;

F. All applicable sales and use taxes have not been paid;

G. An applicant for the proposed business is in violation of or not in compliance with this chapter;

H. An applicant has been convicted or pled nolo contendre to a crime:

1. Involving prostitution; exploitation of prostitution; aggravated promotion of prostitution; aggravated exploitation of prostitution; solicitation of sex acts; sex acts for hire; compelling prostitution; aiding prostitution; sale, distribution or display of material harmful to minors ; sexual performance by minors; possession of child pornography; public lewdness; indecent exposure; any crime involving sexual abuse or exploitation of a child; sexual assault or aggravated sexual assault; rape; forcible sodomy; forcible sexual abuse; incest; harboring a runaway child; criminal attempt, conspiracy or solicitation to commit any of the foregoing offenses or offenses involving similar elements from any jurisdiction regardless of the exact title of the offense; for which:

a. Less than two years have elapsed from the date of conviction, if the conviction is of a misdemeanor offense, or less than five years, if the convictions are of two or more misdemeanors within the five years,

b. Less than five years have elapsed from the date of conviction, if the offense is a felony,

2. The fact that a conviction is being appealed shall have no effect on the disqualification pursuant to this section. (Ord. 11-22-88A §13, 1988)

5.56.140 License--Term. Sexually oriented business and employee licenses issued pursuant to this chapter shall be valid from the date of issuance through January 1st of each succeeding year. The license fees required under Section 5.56.100 above shall not be prorated for any portion of a year, but shall be paid in full for whatever portion of the year the license is applied for. (Ord. 11-22-88A §14, 1988)

5.56.150 License--Notice of change of information. Any change in the information required to be submitted under this chapter for either a sexually oriented business license or sexually oriented employee license shall be given, in writing, to the business license authority and the police department within fourteen days after such change. (Ord. 11-22-88A §15, 1988)

5.56.160 License--Transfer limitations. Sexually oriented business licenses granted under this chapter shall not be transferable. It is unlawful for a license held by an individual to be transferred. It is unlawful for a license held by a corporation, partnership or other noncorporate entity to transfer any part in excess of ten percent thereof, without filing a new application and obtaining prior city approval. If any transfer of the controlling interest in a business licensee occurs, the license is immediately null and void, and the business shall not operate until a separate new license has been properly issued by the city as provided in this chapter. (Ord. 11-22-88A §16, 1988)

5.56.170 License--Display. It is unlawful for any sexually oriented business location within the boundaries of the city to fail to display the license granted pursuant to this chapter in a prominent location within the business premises. It is unlawful for any individual licensed pursuant to this chapter to fail to, at all times while engaged in licensed activities within the corporate boundaries of the city, carry their employee license on their person. If the individual is nude, such license shall be visibly displayed within the same room in which the employee is performing. When requested by police, city licensing or other enforcement personnel or health official, it is unlawful to fail to show the appropriate licenses while engaged in licensed activities within the corporate boundaries of the city. (Ord. 11-22-88A §17, 1988)

5.56.180 License--Statement in advertisements. It is unlawful for any advertisement by the sexually oriented business or employee to fail to state that the business or employee is licensed by the city, and shall include the city license number. (Ord. 11-22-88A §18, 1988)

5.56.190 Regulations and unlawful activities. It is unlawful for any sexually oriented business or sexually oriented business employee to:

A. Allow persons under the age of eighteen years, or the age of twenty-one years if required by applicable liquor ordinance, on the licensed premises, except that in adult businesses which exclude minors from less than all of the business premises, minors shall not be permitted in excluded areas;

B. Allow, offer or agree to conduct any outcall business with persons under the age of eighteen years;

C. Except for seminude dancing bars, to allow, offer or agree to allow any alcohol being stored, used or consumed on or in the licensed premises;

D; Allow the outside door to the premises to be locked while any customer is in the premises;

E. Allow, offer or agree to gambling on the licensed premises;

F. Allow, offer or agree to any sexually oriented business employee touching any patron or customer, except that outcall employees and customers may touch except that any touching of specified anatomical areas, whether clothed or unclothed, is prohibited;

G. Allow, offer or agree to illegal possession, use, sale or distribution of controlled substances on the licensed premises;

H. Allow sexually oriented business employees to possess, use, sell or distribute controlled substances, while engaged in the activities of the business;

I. Allow, offer or agree to commit prostitution, solicitation of prostitution, solicitation of a minor or committing activities harmful to a minor to occur on the licensed premises or, in the event of an outcall employee or business, the outcall employee committing, offering or agreeing to commit prostitution, attempting to commit prostitution, soliciting prostitution, soliciting a minor, or committing activities harmful to a minor;

J. Allow, offer, commit or agree to any sex act as validly defined by city ordinances or state statute;

K. Allow, offer or agree to any outcall employee appearing before any customer or patron in a state of nudity;

L. Allow, offer or agree to allow a patron or customer to masturbate in the presence of the sexually oriented business employee or on the premises of a sexually oriented business. (Ord. 11-22-88A §19, 1988)

5.56.200 Outcall services--Operation requirements. It is unlawful for any business or employee providing outcall services contracted for in the city, to fail to comply with the following requirements:

A. All businesses licensed to provide outcall services pursuant to this chapter shall provide to each patron a written contract in receipt of pecuniary compensation for services. The contract shall clearly state the type of services to be performed, the length of time such services shall be performed, the total amount such services shall cost the patron, and any special terms or conditions relating to the services to be performed. The contract need not include the name of the patron. The business licensee shall keep and maintain a copy of each written contract entered into pursuant to this section for a period not less than one year from the date of provision of services thereunder. The contracts shall be numbered and entered into a register listing the contract number, date, names of all employees involved in the contract and pecuniary compensation paid.

B. All outcall businesses licensed pursuant to this chapter shall maintain an open office or telephone at which the licensee or licensee's designated agent may be personally contacted during all hours outcall employees are working. The address and phone number of the license locations shall appear and be included in all patron contracts and published advertisements. For outcall businesses which premises are licensed within the corporate limits of the city, private rooms or booths where the patrons may meet with the outcall employee shall not be provided at the open office or any other location by the service, nor shall patrons meet outcall employees at the business premises.

C. Outcall services shall not advertise in such a manner that would lead a reasonably prudent person to conclude that specified sexual activities would be performed by the outcall employee. (Ord. 11-22-88A §20, 1988)

5.56.210 Adult business--Design of premises. A. In addition to the general requirements of disclosure for a sexually oriented business, any applicant for a license as an adult business shall also submit a diagram, drawn to scale of the premises of the license. The design and construction, prior to granting a license or opening for business, shall conform to the following:

1. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms;

2. Restrooms may not contain any video reproduction equipment or any of the business merchandise. Signs shall be posted requiring only one person being allowed in the restroom per stall, and only one person in any stall at a time, and requiring that patrons shall not be allowed access to manager's station areas;

3. For businesses which exclude minors from the entire premises, all windows, doors and other apertures to the premises shall be darkened or otherwise constructed to prevent anyone outside the premises from seeing the inside of the premises. Businesses which exclude minors from less than all of the premises shall be designed and constructed so that minors may not see into the area from which they are excluded;

4. The diagram required shall not necessarily be a professional engineer's or architect's blueprint; however, the diagram must show marked internal dimensions, all overhead lighting fixtures, and rating for illumination capacity.

B. It shall be the duty of the licensee and the licensee's employees to insure that the views from the manager's station in subsection A of this section remain unobstructed by any doors, walls, merchandise, display racks or any other materials, at all times that any patron is present in the premises, and to insure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted.

C. The premises shall at all times be equipped and operated with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one footcandle, measured at floor level. It shall be the duty of the licensee and the licensee's employees present on the premises to insure that the illumination described above is maintained at all times that any patron is present in the premises. (Ord. 11-22-88A §21, 1988)

5.56.220 Nude entertainment business--Design of Premises. A. It is unlawful for business premises licensed for nude entertainment to:

1. Permit a bed, sofa, mattress or similar item in any room on the premises, except that a sofa may be placed in a reception room open to the public or in any office to which patrons are not admitted, and except that in an adult theater such items may be on the stage as part of a performance;

2. Allow any door on any room used for the business, except for the door to an office to which patrons shall not be admitted, outside doors and restrooms doors, to be lockable from the inside;

3. Provide any room in which the employee or employees and the patron or patrons are alone together without a separation by a solid physical barrier at least three feet high and six inches wide. The patron or patrons shall remain on one side of the barrier and the employee or employees shall remain on the Other side of the barrier.

B. Adult theaters shall also require that the performance area shall be separated from the patrons by a minimum of three feet, which separation shall be delineated by a physical barrier at least three feet high. (Ord. 11--22--88A §22, 1988)

5.56.230 Nude/seminude entertainment business--Location restriction. It is unlawful for any business licensed for nude/seminude entertainment to be located within five hundred feet of a business licensed for the sale or consumption of alcohol. (Ord. 11-09-99 §2, 1999: Ord. 11--22--88A §23, 1988)

5.56.240 Seminude dancing bar--Operation prerequisites. It is unlawful for any business licensed for the sale or consumption of alcohol pursuant to city ordinances to allow any person on the premises to dance, model or be, or perform in, a state of seminudity without first obtaining a license pursuant to this chapter. (Ord. 11--22--88A §24, 1988)

5.56.250 Seminude dancing bar--Performer restrictions. It is unlawful for any person to perform or appear in a state of seminudity as a professional dancer, model, performer or otherwise on the premises of a business licensed as a seminude dancing bar, either gratuitously or for compensation, unless that person is licensed as a sexually oriented business employee. (Ord. 11--22--88A §25, 1988)

5.56.260 Nude and seminude dancing agencies. A. It is unlawful for any individual or entity to furnish, book or otherwise engage the services of a professional- dancer, model or performer to appear in a state of seminudity or nudity for pecuniary compensation in, or for, any nude entertainment business, adult theater or seminude dancing bar licensed pursuant to this chapter unless such agency is licensed pursuant to this chapter.

B. It is unlawful for any individual or entity to furnish, book or otherwise engage or permit any person to perform as a professional dancer, model or performer in a state of seminudity or nudity, either gratuitously or for compensation, in, or for, any business licensed pursuant to this chapter, unless such person is licensed pursuant to this chapter. (Ord. 11--22--88A §26, 1988)

5.56.270 Performers--Prohibited activities. It is unlawful for any professional dancer, model or performer, while performing in any business licensed pursuant to this chapter:

A. To touch in any manner any other person;

B. To throw any object or clothing off the stage area;

C. To accept any money, drink or any other object directly from any person;

D. To allow another person to touch such performer or to place any money or object on the performer or within the costume or person of the performer;

E. For the performer to place anything within the costume or adjust or move the costume while performing so as to render the performer in a state of nudity. (Ord. 11-22-88A §27, 1988)

5.56. 280 Costume regulations. It is unlawful for performers in seminude dancing bars to fail to comply with the following costume requirements:

A. Performers shall at all times be costumed during performances in a manner not to violate any city ordinance concerning disorderly or obscene conduct, and such performers shall not perform or conduct themselves in such a manner as to violate the provision of any city ordinance. No performer shall appear in any business licensed as a seminude dancing bar during a performance or appearance, with less than opaque clothing which meets the definition of seminude, and, in the case of a female performer, covers the areola and nipple of such performer in a shape and color other than the natural shape and color of the nipple and areola.

B. While on the portion of a business licensed as a seminude dancing bar used by patrons, performers shall be dressed in opaque clothing covering the performer's buttocks and pubic area, and, in the case of a female, the breast and nipples. (Ord. 11--22--88A §28, 1988)

5.56.290 Stage requirements. It is unlawful for any performer in a business licensed as a seminude dancing bar to appear in costume other than on a stage which shall be at least three feet from the portion of the premises on which patrons are allowed, and which shall be separated from the patrons by a solid barrier or railing the top of which shall be at least two feet from the floor. (Ord. 11--22-88A §29, 1988)

5.56.300 Patrons--Prohibited activities. It is unlawful for any person, or any patron of any business to touch in any manner any performer; to place any money or object on or within the costume or person of any performer; or to give or offer to give to any such performer any drinks, money or object while such performer is performing; except that money may be placed on the stage which shall not be picked up by the performer except by hand. (Ord. 11--22--88A §30, 1988)

5.56.310 Nudity--Defenses to prosecution. It is a defense to prosecution or violation under this chapter that a person appearing in a state of nudity did so in a modeling class operated:

A. By a proprietary school licensed by the state, or a college, junior college or university supported entirely or partly by taxation;

B. By a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college or university supported entirely or partly by taxation. (Ord. 11-22-88A §31, 1988 )

5.56.320 Existing businesses--Compliance time limits. A. The provisions of this chapter shall be applicable to all persons and businesses described in this chapter, whether the herein-described activities were established before or after the effective date of the ordinance codified in this chapter, and regardless of whether such persons and businesses are currently licensed to do business in the city.

1. All such persons and businesses requiring out-call service licenses shall have forty-five days from the effective date of this chapter, or until their current license expires, whichever is first in time, to comply with the provisions of this chapter.

2. All seminude dancing bars and employees thereof requiring licenses and nude and seminude dancing agency licenses shall have seventy-five days from the effective date of this chapter, or until their license must be renewed, whichever is first, to comply with the provisions of this chapter.

3. All nude entertainment businesses shall have one hundred days from the effective date of this chapter, or until the current license must be renewed, whichever is first, to comply with the provisions of this chapter.

4. All adult businesses shall have one hundred days from the effective date of this chapter, or until their current

license must be renewed, whichever is first in time, to comply with the provisions of this chapter.

B. For the year 1988, all businesses required by this chapter to be licensed as sexually oriented businesses shall be credited against the fees required by this chapter with the regulatory license fees paid for the current 1988 license. (Ord. 11-22-88A §32, 1988)

5.56.330 Violation--Injunction. An entity or individual who operates or causes to be operated a sexually oriented business, or who commits the crime of lewdness, or who operates such a business or functions as such an employee in violation of the provisions of this chapter, is subject to a suit for injunction in addition to the civil and criminal violations provided in this chapter, and any other remedy available at law or in equity. (Ord. 11-09-99 §3, 1999: Ord. 11-22-88A §33, 1988)

5.56.340 Violation--License suspension or revocation. A. The city may issue a notice suspending or revoking a sexually oriented business or employee license granted under this chapter, if a licensee, or an employee of the licensee has:

1. Violated or is not in compliance with this chapter;
2. Has refused to allow any inspection of the premises of the sexually oriented business specifically authorized by this chapter, or by any other statute or chapter;
3. Has failed to replenish the cost bond as provided in this chapter, such a suspension shall extend until the bond has been replenished;
4. A licensee or employee gave materially false or misleading information in obtaining the license;
5. A licensee or an employee knowingly operated the sexually oriented business or worked under the employee

license during the period when the business licensee or employee licensee's license was suspended;

6. A licensee has committed an offense which would be grounds for denial of a license for which the time period required has not elapsed;

7. On two or more occasions within a twelve-month period, a person or persons committed an offense in or on, or solicited a crime on the licensed premises, of a crime which would be grounds for denial of a license for which a conviction has been obtained, and the person or persons were employees, whether or not licensed, of the sexually oriented business at the time the offenses were committed;

8. A licensee is delinquent in payment to the city for ad valorem taxes, or sales taxes related to the sexually oriented business.

B. Suspension or revocation shall take effect within ten days of the issuance of notice, unless an appeal is filed as provided by this ordinance.

C. The fact that a conviction is being appealed shall have no effect on the revocation of the license. (Ord. 11--22-88A §34, 1988)

5.56.350 Effect of license revocation. When a license issued pursuant to this chapter is revoked, the revocation shall continue for one year from its effective date, and the licensee shall not be issued a sexually oriented business or employee license for one year from the date of such revocation. (Ord. 11-22-88A §35, 1988)

5.56.360 Appeals. A. If the license is denied or approved with qualifications, or if a notice of suspension, revocation or citation of a civil fine is imposed, the applicant or licensee may file an appeal with the business license administrator.

B. Filing of an appeal must be within ten days of the date of service of the notice of any denial, qualified approval, suspension, revocation or civil fine. Upon receiving the notice of such appeal, the business license administrator shall schedule a hearing before the hearing board within twenty days from the date of the appeal unless such time shall be extended for good cause.

C. The hearing board shall hold a public hearing on the record, and take such facts and evidence as necessary to determine whether the denial, qualified approval, suspension, revocation or civil fine was proper under the law.

D. The burden of proof shall be on the city.

E. After the hearing, the license administrator shall have seven working days, unless extended for good cause, in which to render findings of fact, conclusions of law, and recommended decision to the city administrator.

F. Either party may object to the recommendation of the hearing board by filing the party's objection and reasons, in writing to the city administrator within seven days following the recommendation. In the event the hearing board recommends upholding a suspension or revocation, the license shall be immediately suspended, and shall remain suspended until any subsequent appeal is decided. If no objections are received within the seven days, the city administrator may immediately adopt the recommendation of the hearing board.

G. If objections are received, the city administrator shall have ten working days to consider such objections before issuing the city administrator's final decision. The city administrator may, in the city administrator's discretion, take additional evidence or require written memorandum on issues of fact or law. The standard by which the city administrator shall review the decision of the hearing board is whether substantial evidence exists in the record to support the hearing board's recommendation. (Ord. 12-9-97Y (part), 1997; Ord. 11-22-88A §36, 1988)

5.56.370 Violation--Penalty. In addition to revocation or suspension of a license, as provided in this chapter, each violation of this chapter shall, upon citation by the city business license authority, require the licensee to pay a civil penalty in the amount of five hundred dollars. Such fines shall be deducted from the cost bond posted pursuant to this chapter, unless paid within ten days of notice of the fine or the final determination after any appeal. In addition to the civil fines provided in this chapter, the violation of any provision of this chapter shall be a class B misdemeanor. Each day of a violation shall be considered a separate offense. (Ord. 11-22-88A §37, 1988)